(7)

No. 98-5864

In The

Supreme Court of the United States

October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

vs.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 212 TO 435

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VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. Case No. CL 92000305

EDWARD W. MURRAY, et al.

Respondents.

MOTION TO DISMISS

Now come the respondents, by counsel, and move this Court to deny and dismiss the petition for writ of habeas corpus.

* * *

Claim 2

The petitioner next claims that counsel were ineffective for failing to file a motion for exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.[4]

From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed *all* the evidence the Commonwealth intended to present. Both attorneys were taken together to the crime scene, accompanied by the two prosecutors and the chief investigator, and shown the

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[4] Counsel did file a Motion for a Bill of Particulars, parts of which were denied on the grounds that the material requested was actually "discovery." (Tr. 7-8, 14, 18-21).

location of the evidence found there. No evidence was introduced at trial of which the petitioner's counsel had been previously unaware. (See Resp. Exh. 1, ¶ 3). Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.

In addition, counsel could have made a tactical decision not to file such a motion, because it would have made reciprocal discovery available to the Commonwealth under Rule 3A:11(c) of the Rules of the Supreme Court of Virginia. Counsel thus would have been required to disclose any highly prejudicial information then known to them, *e.g.*, the report of Dr. Warren. (See Resp. Exh. 6). Because the decision to forego a formal discovery motion could have been the result of reasonable trial strategy, the petitioner cannot show ineffectiveness under *Strickland*, 466 U.S. at 689; *Darden*, 477 U.S. at 186. Nor, when counsel in fact obtained all the information to which they were entitled under *Brady*, can he show prejudice. This claim must therefore be denied and dismissed.

* * *

Claims 38 - 43

In these six claims. Strickler alleges that counsel ineffectively handled certain of the Commonwealth's witnesses. Specifically, he maintains that counsel:

(a) failed to effectively cross-examine Anne Stolzfus to impeach her credibility (Tr. 494-506) **(Claim 38)**;

(b) failed to effectively cross-examine Donna Tudor to impeach her credibility (Tr. 577-584) **(Claim 39)**;

(c) failed to effectively cross-examine Dr. Oxley, the medical examiner, to elicit from him that it was possible that (1) all four head wounds were inflicted by one blow; (2) if there had been three blows to the head, as he believed, all three were necessary to kill the victim; and (3) the victim was unconscious as the result of other traumas before any blow to the head (Tr. 614-615) **(Claim 40)**;

(d) failed to cross-examine Dianna Wileman, the forensic serologist, to show the inconclusive nature of the blood, saliva, and semen comparisons linking the petitioner to the murder and sexual assault (Tr. 720) **(Claim 41)**;

(e) failed to cross-examine Michael Grim, the fingerprint expert, to show the inconclusive nature of the fingerprint comparisons linking the petitioner to the murder (Tr. 730) **(Claim 42)**;

(f) failed to cross-examine Myron Scholberg, the hair and fiber expert, to show the inconclusive nature of the hair comparisons which placed the petitioner at the murder scene and linked him to the crimes. (Tr. 759) **(Claim 43)**.

In support of each of these claims, the petitioner offers only the record of the cross-examination of these same witnesses at the subsequent trial of his co-defendant, Ronald Henderson. It is meaningless to compare the efforts of different counsel in different trials where the same witnesses testify. If, as the United States Supreme

Court has acknowledged, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, certainly those same attorneys would not defend *different* clients in the same way. The petitioner cannot at all presume that one attorney was "more effective" when his client is found just as guilty. Henderson was convicted of murder, abduction and robbery, and the jury imposed the maximum sentence for each of those charges. (See Resp. Exh. 3). It is clear from this that his counsel's cross-examination of these witnesses did nothing to weaken their credibility or create any doubt in the juror's minds as to his guilt, as Strickler seems to claim.[7]

In *Anderson v. Peyton*, 209 Va. at 805, 167 S.E.2d at 116, the Virginia Supreme Court held that counsel was not ineffective for failing to pursue a different course of action where it was "by no means certain" that the result would have been different. Here, it *is* certain, by the very evidence the petitioner offers in support of these claims, that the result would *not* have been different. Manifestly, then, there can be no prejudice under *Strickland*, and these claims fail.

* * *

[7] Henderson's conviction for first degree, rather than capital murder, arose from instructions defining "triggerman" given by the trial court in his case which the Virginia Supreme Court has since ruled are legally erroneous. Compare Instructions C, D and E (Resp. Exh. 4), and *Strickler*, 241 Va. at 493-495.

Claim 68

In this claim, the petitioner alleges that counsel were ineffective for failing to object to Instruction 1 because it described a form of abduction, "with the intent to defile", which is not a predicate for capital murder under § 18.2-31.

The capital murder indictment against Strickler charged that he "did unlawfully, feloniously, willfully, deliberately and with premeditation kill and murder Leanne Whitlock during the commission of robbery, rape or abduction with the intent to extort money or a pecuniary benefit." (R. 1). Two other indictments charged that he did "unlawfully and feloniously rob Leanne Whitlock of a motor vehicle or other personal property by violence to the person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm" (robbery) (R.2), and that he "did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or to defile Leanne Whitlock" (abduction). (R. 1).

The jury was instructed as follows:

Instruction 1

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant killed Leanne Whitlock; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile, or was of a person during the commission of, or subsequent to, rape.

(R. 100). The jury was also instructed that

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intended to steal; and

(2) That a motor vehicle or other personal property was taken; and

(3) That the taking was from Leanne Whitlock or in her presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by violence to the person or threat of serious bodily harm.

* * *

A "deadly weapon" is any object or instrument that is likely to cause death or great bodily injury because of the manner, and under the circumstances, in which it is used.

* * *

The defendant is charged with the crime of abduction. Kidnapping and abduction are the same crime. The Commonwealth must prove

beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by force or intimidation did seize, take, transport, detain, or hide Leanne Whitlock; and

(2) That the defendant did so with the intent to obtain money or other benefit of value or with the intent to defile Leanne Whitlock; and

(3) That the defendant acted without legal justification or excuse.

(R. 107, 102, 108). The jury convicted Strickler of "capital murder as charged in the indictment and as defined in Instruction 1," robbery "as charged in the indictment," and abduction "as charged in the indictment." (Tr. 869). At sentencing, the court reaffirmed convictions of capital murder, robbery, and "abduction with intent to defile." (9/19/90 Tr. 25-26).

While abduction with the intent to defile is not one of the predicate felonies for capital murder pursuant to § 18.2-31, the language of the jury instruction was not prejudicial. Here, the jury unanimously found beyond a reasonable doubt that Strickler was guilty of robbery while armed with a deadly weapon. That is one of the predicate felonies for capital murder, *see* § 18.2-31(4), and was specifically enumerated in his capital murder indictment. Thus, there can be no question that he was found guilty beyond a reasonable doubt of capital murder in the commission of robbery while armed with a deadly weapon.

The United States Supreme Court has ruled that "the issue in a collateral proceeding is 'whether the ailing

instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Stokes v. Warden*, 226 Va. at 119, 306 S.E.2d at 886, *quoting Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The "total context of the events at trial" must be evaluated in making such a determination. *United States v. Frady*, 456 U.S. 152, 169 (1982), *quoted in Stokes*, 226 Va. at 119, 306 S.E.2d at 886.

There can be no question that the murder was willful, deliberate and premeditated, given that the victim was alive when the fatal wounds were inflicted and that the evidence of her struggle was Strickler indicated that she had to be held down while she was killed. In addition, Strickler drove Leanne's car after the murder, gave the earrings she was wearing when she was abducted to Donna Tudor, and attempted to use Leanne's credit cards in Virginia Beach after the murder.

It is clear from this that Strickler's convictions for capital murder and armed robbery were both legally correct and proven beyond a reasonable doubt. Rape is also a predicate for capital murder and the evidence showed that a rape had occurred. The erroneous inclusion of "intent to defile" language in the capital murder instruction does not change this. Consequently, Strickler can show no actual prejudice. The Virginia Supreme Court reached the same conclusion in *Stokes*. There, an instruction which presumed that a defendant intended the natural and probable consequences of his acts was given in a murder trial, several months after the United States Supreme Court, in *Sandstrom v. Montana*, 442 U.S. 510 (1979), had ruled such burden-shifting instructions impermissible. In spite of that, however, the Court in *Stokes* denied his petition for a writ of habeas corpus

because it found that, where the evidence of his premeditation was overwhelming, he could not show actual prejudice, 226 Va. at 119, 306 S.E.2d at 886. The same reasoning and conclusion necessarily applies here. Given the jury's unanimous conclusion that Strickler was guilty of robbery, there is no reasonable probability that the jury would not have convicted him of capital murder if it had not received the erroneous instruction that abduction with intent to defile was a possible predicate for a capital murder conviction.

* * *

For all the foregoing reasons, Strickler's petition for a writ of habeas corpus should be denied and dismissed without an evidentiary hearing.

Respectfully submitted,

EDWARD W. MURRAY, et al.,

By /s/ H. Elizabeth Shaffer
Counsel

H. Elizabeth Shaffer
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CERTIFICATE OF SERVICE

I certify that on the 12th day of November, 1992, a copy of the foregoing Motion to Dismiss was hand-delivered to Victor M. Santos, Esquire and Katherine Carruth Link, Esquire, 12 North New Street, P. O. Box 1287, Staunton, VA 24401.

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Assistant Attorney General

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

No. CL 92000305

v.

EDWARD W. MURRAY, et al.

Respondents.

AFFIDAVIT

STATE OF VIRGINIA,

CIT [sic] OF STAUNTON, to wit:

The affiants, William E. Bobbitt, Jr., and Thomas E. Roberts being duly sworn, state as follows:

1. We are William E. Bobbitt, Jr., and Thomas E. Roberts. We represented Tommy Strickler at his 1990 jury trial in Augusta County for capital murder, abduction and robbery. We base our statements in this Affidavit on our personal knowledge and investigation of this case. (Except where otherwise indicated by the context, "we" and "our" should be construed to refer to the defense team and not necessarily both defense attorneys).

2. One of us (Bobbitt) has been practicing law since 1969 and has been the full-time Public Defender for the region consisting of Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro and Buena Vista since 1974, in which capacity he has devoted 100% of his practice to criminal defense work. He has defended three other defendants on capital murder charges, one of which

resulted in a capital murder conviction and a death sentence.

The other (Roberts) has been practicing law since 1976, and was hired by Bobbitt as part-time Assistant Public Defender in 1989, to which he has devoted approximately 50% of his practice. In the twelve years prior to this, he devoted approximately 50% of his practice to criminal defense work, both retained and court appointed, excluding the one year (1983-1984) during which he was a full-time student at Harvard University. We both had extensive experience trying felony jury cases, and worked together extremely well during the investigation and trial of Strickler's case.

3. We thoroughly investigated Strickler's case, both as to the facts surrounding the offense, and the potential aggravating and mitigating evidence that could be presented at a penalty stage proceeding if Strickler were convicted of capital murder. In this we were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files, and were driven by them to the crime scene with their investigators, where they pointed out to us where each item of evidence had been found at that site. As a result of this cooperation, they introduced nothing at trial of which we were previously unaware.

JURY SELECTION

4. Prior to trial, we obtained and carefully reviewed the list of prospective jurors, including their addresses and occupations, and also reviewed a list of jurors from

that term of court to determine who had previous jury experience. From these lists, we were also able to talk with people we knew who knew some of the prospective jurors.

5. We arranged for Strickler to be appointed co-counsel in hopes that he could address the jury without being subject to cross-examination. However, we also consulted with him during jury selection and sought his suggestions and impressions concerning the venire. We concluded that a highly intelligent jury might be more favorable to him because it might be more open-minded, and not be distracted by the gruesome nature of the crime. We also thought that a more intelligent jury would better understand the "triggerman" issue and be able to apply it to what we thought might be evidence which was confusing or muddled at points, because we fully expected Judge Wood to grant an "actual perpetrator" instruction rather than the one given. The questions we asked any given juror were based on our combined professional judgment as well as input and preference from the defendant as to how best to determine whether a juror was impartial or would be favorable or unfavorable to the defense. If a prospective juror's answers gave us any doubt about his or her impartiality, we either challenged the juror for cause or followed up with additional questions until the additional answers, in our judgment, removed any doubt or until we believed the answers justified a challenge for cause. Those questions were also designed to secure the most intelligent jury possible.

6. Because we were dealing with an interracial crime in a rural area, we discussed in advance whether to question the jurors about their specific racial attitudes to

determine racial bias. Interracial crimes in our area are relatively rare, and we were uncertain what effect race questions would have on the venire. We decided not to ask such questions because we did not want to emphasize that the victim was black and the defendant white. In our best professional judgment, we were concerned that we might alienate the jury by implying that they were biased, or might inadvertently suggest that the death penalty was appropriate because the crime was interracial.

7. Augusta County has a large Mennonite population, and for that reason, we also discussed whether to question the venire about their specific religious affiliation and its effect on their beliefs about the death penalty. Exercising our best professional judgment, we decided to forego such questions because we could not comfortably determine whether they would help or hurt the defendant. Although we knew that the Mennonite Church is a "peace church," and as such is opposed to capital punishment, we also knew more modern Mennonites whose beliefs deviated from that position. Furthermore, we also realized that any Mennonite who did adhere to his church's stedfast [sic] opposition would warrant a challenge for cause, so that even a response to such questions which helped Strickler would not have yielded a jury more favorable to him.

8. We made a strategic decision not to further object when the court rephrased our question regarding predisposition to the death penalty to "how do you feel about the death penalty," because we believed that the permitted question would reveal any pre-existing bias, and we

did not want to risk alienating the court at the start of a long and stressful trial without good reason.

9. We decided not to question the venire about their ability to consider and weigh any mitigating evidence because, in our judgment, the mitigation evidence available to us was neither strong nor persuasive. We did not want to be perceived as having implicitly made promises to the jury by suggesting the possibility of such evidence when we knew we would not be able to produce it.

10. Ms. Hickox appeared open and fair in the way she answered voir dire questions, and for that reason, we decided not to strike her.

11. In voir-diring Mr. Scheufel, we gave serious consideration to his previous law-enforcement ties. However, we knew that he had no had direct experience in serious criminal investigations, and thought from his demeanor and answers that he was intelligent and would judge fairly. We chose not to strike him for that reason.

12. It was also clear to us that Dr. Painter satisfied our "intelligent juror" criterion. We were convinced from his answers that nothing he had read or heard about the case would prejudice him against Strickler. In addition, he appeared open-minded and fair as he answered questions about the death penalty, and for that reason, we chose not to challenge or strike him.

13. Venireman Joyce appeared to be very open-minded in stating that he would consider both alternatives of life and death, and we were impressed by his demeanor. In our judgment, he was a fair man, and we wanted him on the jury for that reason.

PRE-TRIAL MATTERS

14. On January 25, 1990, Bobbitt, his investigator, Thomas Ashby, and Strickler's attorney on his Harrisonburg charges attended a line-up at the Augusta County Sheriff's officer [sic] shown to Kurt Massie. All the observers saw a group of six men. Strickler had blond and bushy hair; all the others had either blond hair or bushy hair. Strickler has a very distinctive appearance, and would probably stand out in any group of men, no matter how similar in appearance. I (Bobbitt) thought that this was probably as fair an assemblage of men with characteristics similiar [sic] to Strickler as possible, and I thought it was fairer than a photospread would have been. In my best professional judgment, the line-up was not legally unfair, and for that reason, I did not feel there was any basis to object, nor did Strickler's Harrisonburg attorney, because she neither commented on it to me or said anything to anyone else about it. I did challenge Massie's identification in court, but his testimony only revealed what I already knew from having been at the line-up: there was nothing impermissibly suggestive in the identification procedure. For these reasons, I made no further objections to the line-up or to Massie's identification of Strickler.

15. As we prepared for trial, Ronald Henderson was still at large, and we determined that it was emphatically in our client's best interest that his trial occur before Henderson was apprehended. Although we were aware of Henderson's statement to Kenneth Workman by the time Strickler's trial began and planned to use Workman as our witness, we were very concerned that when Henderson was caught, he would admit being present at the

murder but claim that Strickler, not he, had actually dropped the rock and killed Leanne Whitlock. We were equally concerned that specimens taken from Henderson, once subject to analysis, might definitively eliminate him as the perpetrator and equally definitively confirm Strickler as the perpetrator, not only of the murder, but possibly of the rape as well, thereby subjecting him to another felony charge which is a predicate for capital murder.

OPENING STATEMENT

16. As a general rule, we each avoid making frequent or repeated objections during the prosecutor's opening statement, because often it alienates the jury and prejudices them against our client. Here, we decided to use any overstatements by the prosecutor to our advantage in closing arguement [sic], by emphasizing to the jury that the evidence he had produced had fallen short of what he had earlier promised. For that reason, we kept silent about his discussion of Donna Tudor's testimony and of the "excellent police investigation." By the time the prosecutor began to describe the sentencing phase of the trial, we could see that the jury had been visibly moved by his opening statement and was ready to be angry with us and the defendant for any reason. Consequently, we did not object to the sentencing phase discussion. We also felt that any objection to Ervin's statement about doing justice for the victim and her family would have had the same negative result for Strickler.

GUILT PHASE TESTIMONY AND EVIDENCE

17. Well before trial we had seen Commonwealth's Exhibit 18, which was a picture of the logs and debris concealing Leanne's body. Once we had seen the field in which her body was found, it was obvious to us also that those logs had intentionally been placed together to hide her corpse. Moreover, their condition was an insignificant issue in the case. We chose not to object when Detective Hoover testified about the condition of the logs because we saw nothing to be gained from objecting to so minimal a matter and did not want to tax the jury's good will be doing so.

18. Before trial we had seen all the physical evidence that the Commonwealth planned to introduce and we determined that the chain of custody had been properly maintained on each item. Because our strategy was to create doubt that Strickler had actually killed Leanne Whitlock, evidence of other people's presence at the crime scene and involvement in the crime would be beneficial to Strickler, and we wanted all of it before the jury. Consequently, we would have undermined our own strategy if we had successfully objected to the physical evidence seized at the scene and later from Donna Tudor and Mr. and Mrs. Silvious' home (Claims 58-64). Furthermore, chain of custody objections can be very technical in nature and their import is often lost on a jury. We did not want to confuse or alienate the jury by making technical objections on issues whose significance might elude them.

19. We had contacted Harry B. Dice, III, before trial and had subpoenaed him to testify for Strickler. However,

just before he was to take the stand, we asked our investigator, Tom Ashby, to review Dice's testimony with him. He came to us and told us that part of what Dice would say included him seeing the defendant use his knife to fix a gold chain after the murder while Strickler was at Dice's Inn. Fearing that the mention of a knife in his possession so shortly after the murder would be very damaging and would help the Commonwealth prove that Strickler had in fact been armed earlier that evening, and would far outweigh any possible benefit from Dice's testimony, we chose to forego his testimony.

GUILT PHASE INSTRUCTIONS AND ARGUMENT

20. We offered Instruction E as an alternative to the Commonwealth's proposed Instruction 10. Their instruction stated that "[e]xtort means to obtain something of value from a person by force," while "E" stated that "[e]xtort means to compel someone to part with something of value." Because robbery requires the use of force or violence, their proposed instruction did not draw the necessary distinction between robbery and extortion, as an element of abduction for pecuniary benefit. Without that distinction, the jury might erroneously convict Strickler of abduction when the evidence only showed robbery. We hoped the jury would conclude that, with extortion as a necessary element of abduction, there was insufficient evidence to prove the abduction, which would have eliminated one of the predicate crimes for capital murder. The more doubt we could create about Strickler's commission of the underlying felonies, the better the chance that he would not be convicted of

capital murder at all. (We also thought there was slight evidence that he was armed when he robbed Leanne).

21. When, during closing argument, the prosecutor told the jury that they were the jury for the Whitlock family also, we chose not to object in order to avoid further emphasizing the remark. In our best professional judgment, we did not consider it a particularly inflammatory remark, and we did not want to risk alienating the jury at such a crucial time for our client.

22. Our strategy in closing argument was to stress the total lack of direct evidence that Strickler had actually murdered Leanne. Over our strenuous objection, the court had already granted the "joint triggerman" instruction. We felt that the evidence clearly established the abduction and robbery, and the physical and forensic also evidence clearly established Strickler's presence at the murder scene. Because the evidence also showed Henderson was present, our best professional judgment told us that our only real hope lay in creating so much doubt about who actually killed Leanne that the jury would not want to risk sending the wrong man to the electric chair, and thus would convict only of first degree murder. We strongly felt that to deny that any crime had even been committed would have destroyed our credibility with the jury and along with it, any hope of sparing Strickler's life.

SENTENCING PHASE

23. Well before trial, we spoke at length with Strickler in search of mitigation evidence. Either we personally or Thomas Ashby, our full-time investigator,

spoke with everyone we could find, either because Strickler referred us to them or because those to whom Strickler referred us gave us their names. This included his mother and sisters, neighbors who had known him when he was growing up, and people with whom he had worked. With the exception of the witnesses we actually called, everyone we contacted had negative and unfavorable things to say about him. Many said they always knew he would get into trouble. Even some of his family members told us that if he had murdered Leanne, then he deserved to die for it.

We were thoroughly familiar with the violence and hostility in Strickler's childhood environment, both from talking with his family and from Janet Warren's report. But we were equally aware that he had frequently and violently struck back. This was particularly clear in Dr. Warren's report, and would have been extremely damaging to him at the sentencing phase on the issue of future dangerousness. Any attempt to bring the home violence issue before the jury through Dr. Warren would have subjected her to vigorous cross-examination about Strickler's own violent propensities. For that reason, we felt that the most favorable and sympathetic, and least damaging, testimony, should come in through his mother and sisters.

All of the choices we made regarding which witnesses to present and which not to present were the result of our combined professional judgment and trial strategy based upon our own investigation and upon all the information Strickler had given to us. Our goal at all times

was to present to the jury a picture of Strickler which was as favorable and as sympathetic as possible.

/s/ William E. Bobbitt, Jr.
Affiant

Sworn and subscribed to before me, a Notary Public, in and for the City and State aforesaid on this 6th day of November, 1992.

/s/ Linda H. Major
Notary Public

My commission expires:

June 11, 1993

/s/ Thomas E. Roberts
Affiant

Sworn and subscribed to before me, a Notary Public, in and for the City and State aforesaid on this 6th day of November, 1992.

My commission expires:

/s/ Linda H. Major,
Notary Public

June 11, 1993

VIRGINIA: IN THE CIRCUIT COURT OF
AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner

v. CASE NO.: CL 92000305

EDWARD W. MURRAY, et al,

Respondents

MOTION FOR FUNDS FOR INVESTIGATOR

Comes now the Petitioner, by counsel, and states as follows:

1. That Petitioner has filed a Petition for Writ of Habeas Corpus Ad Subjiciendum which is pending in this court.

2. That Respondents have filed a Motion to Dismiss said Petition. The basis for the Motion to Dismiss with respect to many counts of the Petition is that no evidence has been proffered to demonstrate prejudice resulting from various allegations of ineffective assistance of trial counsel.

3. That in order to procure the necessary factual basis to support certain of Petitioner's claims, investigatory work is necessary that cannot adequately be performed by habeas counsel alone.

4. That habeas counsel is aware of potential witnesses with respect to certain of Petitioner's claims.

5. That, if habeas counsel alone questions all witnesses, such counsel risks becoming a witness for

impeachment purposes and having to withdraw as counsel in the event a witness gives a contradictory account of events when summoned for trial.

6. That habeas counsel is in need of the assistance of an investigator to research the extent and nature of media coverage of the events leading to the trial of Petitioner's charges.

7. That habeas counsel is in need of the assistance of an investigator to question certain potential witnesses and to be available to testify, by affidavit or in person, at a hearing with respect to the claims raised by Petitioner.

8. That Petitioner is without funds or resources and is not capable of paying for the assistance of an investigator.

9. Section 14.1-183 of the Code of Virginia (1950) as amended, allows an indigent person to sue or defend a suit without paying fees or costs, and further allows such person to be provided with all "needful services" in connection with the case. Investigative services are necessary in the prosecution of this habeas corpus petition. The Commonwealth of Virginia has provided for payment of expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner. *See* Appropriations Act, item 26(3) (1993 Va. Acts of Assembly Ch. 994)

10. Under United States Supreme Court decisions, a death sentence is unconstitutional unless the defendant has been provided "meaningful access" to the post-conviction review process. *See Murray v. Giarratano*, 492 U.S.

1 (1989). Without access to investigative services, Petitioner will be denied meaningful access to review of his conviction and death sentence.

WHEREFORE, Petitioner respectfully requests this court to enter an order allowing counsel for Petitioner to hire at state expense an investigator for the purposes of (1) assisting habeas counsel in the investigation of the facts supporting Petitioner's claims, (2) reporting to habeas counsel his findings, (3) submitting an affidavit as to facts supporting Petitioner's claims, and (4) if necessary, testifying at any hearing granted with respect to the Petition.

Respectfully submitted,

TOMMY DAVID STRICKLER

By Counsel

Nelson, McPherson, Summers & Santos

By: /s/ Victor M. Santos
Victor M. Santos

and

/s/ Katherine Carruth Link
Katherine Carruth Link
12 N. New Street
P. O. Box 1287
Staunton, Virginia 24402-1287

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Funds for Investigator was mailed to H. Elizabeth Shaffer, Assistant Attorney General, Counsel for Respondents, Supreme Court Building, 101 N. Eighth Street, Richmond, Virginia 23219, this 13th day of May, 1993.

/s/ Katherine Carruth Link
Katherine Carruth Link

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. RECORD NO. CL 92000305

EDWARD W. MURRAY, *et al*,

Respondents.

RESPONSE TO MOTIONS FOR FUNDS FOR: EXPERT WITNESS, INVESTIGATOR, EVALUATION OF PSYCHOLOGICAL TEST RESULTS, AND MITIGATION EXPERT.

Come now the Respondents, by counsel, and in response to Petitioner's Motions for Funds for: Expert Witness, Investigator, Evaluation of Psychological Test Results, and for Mitigation Expert, state as follows:

1. On November 4, 1991, the United States Supreme Court denied certiorari on Petitioner's direct appeal. *See Strickler v. Virginia*, ___ U.S. ___, 112 S. Ct. 386 (1991). On August 27, 1992, nine and a half months later, Strickler filed a Petition for Writ of Habeas Corpus, raising 139 separate claims. Petitioner filed his Petition without the use of any of the experts he now requests. Having filed his Petition unassisted, *a fortiori* he cannot now establish the need of experts.

2. None of Petitioner's claims raise issues of fact. (See Motion to Dismiss). The record itself reveals that all his allegations only address matters of law for which no evidentiary hearing, and therefore necessarily no experts, are warranted.

3. The "meaningful access" in a death penalty case to which Petitioner refers does not even create a constitutional right to the assistance of counsel in state habeas proceedings. *See Murray v. Giarratano*, 492 U.S. 1, 12 (1988); *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2566 (1991). To the contrary, in *Giarratano*, the United States Supreme Court ruled that states have "wide discretion" in selecting appropriate options for post-conviction proceedings, and specifically held that Virginia's scheme, which did not *require* appointment of counsel (although it routinely does provide counsel), did not violate the Constitution. *Giarratano*, 492 U.S. at 14. That decision was based on the principle that "[S]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Id.*, 492 U.S. at 10. "A post conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a *presumptively valid criminal judgment*. Nothing in the Constitution requires the State to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings." *Id.*, 492 U.S. at 13 (O'Connor, J., concurring).

Consequently, where appointment of counsel is not required in capital habeas proceedings, and where Virginia courts have consistently denied capital defendants the appointment of experts at the trial stage, when Constitutional rights are at issue, *see e.g., O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 484 U.S. 871 (1988) (forensic scientists); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987),

cert. denied, 485 U.S 971 (1988) (identification expert); *Gray v. Commonwealth*, 233 Va. 313, 330, 356 S.E.2d 157, 166, *cert. denied*, 484 U.S. 873 (1987) (investigator), it necessarily follows that Petitioner has no right to any of the experts he requests for this state habeas proceeding.

4. Nothing in Virginia law or in the Appropriations Act authorizes the appointment of the experts Petitioner requests. Virginia Code § 14.1-183 states:

> Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party.

Paragraph 25(3), 1991 Virginia Acts 723, provides, "the *state's share of expenses* incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner" shall be paid from amounts designated for pre-trial, trial, and appellate processes. (emphasis added). Since under § 14.1-183 the state's share of expenses pertains only to counsel fees, service of process fees, and court costs, the General Assembly did not intend to authorize the payment of *all* expenses incident to a habeas petition.

EXPERT WITNESS FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

6. Even in this court were to grant an evidentiary hearing on Petitioner's ineffective assistance of counsel claims, under *Strickland v. Washington*, 466 U.S. 668 (1984), there would be no basis for the appointment of an expert witness "to evaluate trial counsel's performance and testify as to whether trial counsel's [sic] performance rose to the level of effective assistance of counsel." (Motion, p. 2). As *Strickland* recognizes, "[E]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Because the practice of law is an art as well as a science, and no two attorneys can be exactly alike in the practice of the profession, it is basically unreasonable to judge one attorney by what another, with the benefit of hindsight, says he might or would have done. *Williams v. Beto*, 354 F.2nd 689, 706 (5th Cir. 1965). Hindsight by a non-participant can always be used to cast doubt on actual trial tactics used. *Reynolds v. Mabry*, 574 F.2d 978, 979 n.3 (8th Cir.1978).

Under *Strickland*, however, judicial scrutiny of counsel's performance must be "highly deferential," must "eliminate the distorting effects of hindsight" and must "reconstruct the circumstances of counsel's challenged conduct," so as to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. No expert is required to apply this standard for the trier of fact who also presided at trial.

7. In requesting an expert at this late date, Petitioner undermines his claims of ineffective assistance of

counsel. If counsels' performance violated both *Strickland* prongs as required, no expert would be needed to elucidate this fact for the court.

8. The function of a habeas proceeding is neither to retry the case nor to try trial counsel for their conduct. Petitioner has offered no authority, and has shown on basis, for his request for an expert to address counsels' effectiveness.

INVESTIGATOR TO ESTABLISH FACTUAL BASIS FOR CLAIMS

9. Strickler's Petition contains 139 separate habeas claims. By requesting appointment of an investigator "to procure the necessary factual basis to support certain of Petitioner's claims" (Motion, p. 1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees. (*See* Motion to Dismiss). It would appear, therefore, that this Motion has been filed only to delay resolution of these proceedings.

10. Where appointment of an investigator at the *trial* of a capital case is "an act of judicial grace not constitutionally required," *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029 (1983), all the more so is this true in this collateral proceeding. *See e.g., O'Dell*, 234 Va. at 686, 364 S.E.2d at 499; *Willis v. Zant*, 720 F.2d 1212, 1215, n.5 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (failure of state to provide financial assistance for habeas proceeding states no constitutional issue).

11. Moreover, Strickler has not demonstrated any clear need for the investigator he requests. Speculation about "certain potential witnesses" or "the extent and nature of media coverage of the events" (Motion, p. 2) is totally insufficient. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 323-324, n.1 (1985) (generalized assertion of need for investigator insufficient *at trial*). There is no legal or factual basis for this request for an investigator.

EXPERT WITNESS TO EVALUATE PSYCHOLOGICAL TEST RESULTS

12. Strickler has cited no authority for his request for a psychological or neuropsychological expert, nor can he. Before trial, at his counsels' request, the court ordered psychological and neuropsychological examinations of the Petitioner. This habeas proceeding is not a relitigation of his guilt or innocence, nor it is a retrial of the factual issues underlying aggravation and mitigation evidence, or of the punishment the jury properly imposed.

13. Any alleged "deficiency" in the choice of tests given or in the evaluation of their results does not warrant the relief he seeks. Petitioner has not alleged that the experts appointed at trial were ineffective. Even such a claim is not cognizable in a habeas corpus proceeding. The United States Court of Appeals for the Fourth Circuit recently "rejected the notion that there is either a procedural of constitutional rule of ineffective assistance of an expert witness, rather than ineffective assistance of counsel." *Pruett v. Thompson*, ___ F.2d ___ (4th Cir., May 25, 1993) (No. CA-90-667, slip op. at 22, n.12). The Court explained:

> 'It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another. . . . To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.'

Id., quoting Waye v. Murray, 884 F.2d 765, 767 (4th Cir.) (per curiam), *cert. denied*, 492 U.S. 936 (1989).

14. Manifestly, there is no provision in law for appointing such psychological experts at this state habeas proceeding. Petitioner has already filed his Petition, and was obligated to investigate all possible claims before he did so. Even if a right to psychological experts existed, his request would be now be [sic] too late.

MITIGATION EXPERT

15. Finally, Petitioner has cited no authority for his request for a "trained mitigation specialist" (Motion, p. 1), nor is there any. No right to a mitigation expert exists for a capital defendant even at trial. *See generally Quintana*, 224 Va. at 135, 295 S.E.2d at 646. All the less is he entitled to such an expert in this collateral proceeding. *See generally Giarratano*, 492 U.S. at 10.

16. It is clear from the trial record that mitigation investigation was done and that Petitioner was subjected to both psychological and neuropsychological examinations. (R. 5-7, 10-13). His speculative assertion of need based on "other mitigation evidence" which "could have

been discovered," (Motion, p. 1), is wholly insufficient to justify the relief he requests.

17. Having already filed his Petition, this after the fact request for an expert to which he is not entitled can only be interpreted as a further attempt to delay these proceedings. There is no basis in law or in fact for granting his request for this expert.

CONCLUSION

17. More than seven months have passed since Respondents filed their Motion to Dismiss this Petition. It was not until Respondents moved for entry of an Order dismissing the Petitioner that Petition filed these Motions. And Petitioner has yet to respond to the Motion to Dismiss.

WHEREFORE, Respondents respectfully ask this court to deny and dismiss Petitioner's Motions for Funds for an Expert Witness regarding claims of ineffective assistance of counsel, for Funds for an Investigator, for Funds for and Expert Witness to Evaluate Psychological Test Results, and for Funds for a Mitigation Expert.

In view of the total lack of response to the Motion to Dismiss, Respondents also ask this Court to set a date on which that Motion may be argued.

Respectfully submitted,
EDWARD W. MURRAY, *et al.*,

By: /s/ H. Elizabeth Shaffer
Counsel

STEPHEN D. ROSENTHAL
Attorney General of Virginia

H. ELIZABETH SHAFFER
Assistant Attorney General
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

On June 28, 1993, I mailed copies of this Response to Victor M. Santos, Esq., and Katherine Carruth Link, Esq., NELSON, MCPHERSON, SUMMERS & SANTOS, 12 N. New Street, Staunton, Virginia 24402-1287, counsel for the Petitioner.

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Assistant Attorney General
Appellate Section

VIRGINIA: IN THE CIRCUIT COURT
OF AUGUST COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. NO. CL 92000305

EDWARD W. MURRAY, *et al*,

Respondents.

ORDER

Upon mature consideration of the petition for a writ of habeas corpus, the motion to dismiss of the respondent, a review of the record of the criminal cases of *Commonwealth of Virginia v. Thomas David Strickler*, which is hereby made part of the record in this matter, the Court finds, for the reasons stated in the Motion to Dismiss, that the petitioner is not entitled to the relief sought:

Pursuant to *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1990), claims previously adjudicated against a petitioner may not be relitigated in habeas corpus. Barred from consideration by the rule of *Hawks* are **Claim II, subparts 1-3, 5-9, 11, 14, 19 and 23.**

Pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), habeas corpus is unavailable for claims which could have been raised at trial and on appeal. Barred from consideration by the rule in *Parrigan* are **Claim II, subparts 4, 10, 12, 13, 16-18, 22, 25-32 and Claim III, subparts 1-9.**

In addition, **Claim II, subparts 15, 20, 21 and 24** are barred under both *Hawks* and *Parrigan*.

The Court also finds that none of the petitioner's allegations of ineffective assistance of counsel in **Claim I, subparts 1 through 96** meet the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

The Court further finds that the petitioner's allegations of newly discovered evidence raised in **Claim IV, subparts 1 and 2** are barred from review on habeas corpus.

The Court further finds that the petitioner's motions for appointment of experts: to evaluate ineffective assistance of counsel claims, to investigate factual bases for claims, to evaluate psychological test results, and to investigate possible mitigation evidence, are without merit.

The Court further finds that the petitioner's motion to disqualify it is without merit.

The Court finding no basis for relief, it is therefore **ADJUDGED and ORDERED** that this petition for a writ of habeas corpus is hereby **DENIED and DISMISSED**. It is further **ADJUDGED AND ORDERED** that all motions to appoint experts and/or investigators, as well as the motion to disqualify the judge, are hereby **DENIED and DISMISSED**, to which actions the petitioner's objections are noted.

It is further **ORDERED** that the clerk of this Court forward certified copies of this order to counsel of record.

Enter this 10 day of
September, 1993.

/s/ H. Wood
Judge

I ASK FOR THIS:

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Counsel for Respondents

SEEN AND OBJECTED TO:
For Reasons Set Forth In Oral Argument

/s/ Katherine Carruth Link
Katherine Carruth Link
Counsel for Petitioner

/s/ Victor M. Santos
Victor M. Santos
Counsel for Petitioner

Daily News-Record
Harrisonburg, Va., Wednesday, July 18, 1990
Letters

THE TRAGEDY

As a witness to the abduction of Leann Whitlock, I agree with Rob Jordan that racial prejudice was a factor in her murder. We must do all that we can to break down our stereotypes and differences.

However, it was not lack of caring about human life and it was not lack of caring about Leann because she was black that led me to not call the police that Jan. 5 night. My concern was raised because of Strickler's repeatedly hitting her. My interpretation of her leaning on the horn and then mouthing "Help" was that she was responding to the violence. then as they drove away, the four of them seemed calm and Strickler was sitting close to Leann with his left arm up around her. This is what reassured me and made me believe that she was OK. It never occurred to me that I was witnessing an abduction.

In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture.

Would it have occurred to me that this was an abduction if those three characters were black and the beautiful, well-dressed girl were white? I don't think so. Would

those characters have murdered Leann if she had been white? Probably not. There lies the tragedy.

We all have an obligation to work toward peace. Being aware of our stereotypes and ignorance is only the first step.

Anne Stoltzfus
Harrisonburg

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95cv924
v.	)	
J.D. NETHERLAND, Warden, Respondent.	)	

ORDER

(Filed Dec. 10, 1996)

The Court is in receipt of the respondent's motion to dismiss petitioner's habeas corpus petition. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion to dismiss with respect to claims B(10), C, E, G, H, I, K, L, M, O, P, Q, R, T, and V.

The Court grants an evidentiary hearing on the remainder of petitioner's claims.

Let the Clerk send copies of this Order to counsel of record.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DEC. 10, 1996
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	
v.	)	Civil Action No. 3:95CV924
J.D. NETHERLAND, WARDEN Respondent.	)	

MEMORANDUM

On September 19, 1990 the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254 Strickler filed a Petition for a Writ of Habeas Corpus and an Amended Petition for a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. This matter comes before the Court on Respondent's motion to dismiss Strickler's petition for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion has been fully briefed by the parties and is ripe for decision.

BACKGROUND

1. Procedural History:

On February 27, 1990 the Circuit Court of Augusta County, Virginia charged Strickler on one count of abduction and one count of robbery. On April 23, 1990 the court indicted him for capital murder. Strickler pleaded not guilty to all charges. Strickler was tried by a jury before the Circuit Court of Augusta County (J.Wood) and found guilty of capital murder, robbery and abduction. The jury sentenced him to two life sentences and to death on June 21, 1990, and the judge upheld the sentence in the sentencing hearing on September 19, 1990.

On April 19, 1991 the Virginia Supreme Court upheld Strickler's conviction and sentence in *Strickler v. Commonwealth*, 404 S.E.2d 227 (1991). The United States Supreme Court denied his petition for a writ of certiorari. Subsequently, Strickler filed a petition for a writ of habeas corpus in the Circuit Court of Augusta County. The court dismissed the petition in full without an evidentiary hearing on September 10, 1993. The Virginia Supreme Court granted certiorari with respect to limited issues, but denied the petition on January 13, 1995. *Strickler v. Netherland*, 452 S.E.2d 648 (1995). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on October 2, 1995. On March 5, 1996 Strickler filed his federal habeas corpus petition in this Court.

Factual Background

In affirming Strickler's conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne *486 dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push

him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[1] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back

[1] Leanne was black.

seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head-on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt. Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car behind Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church.

Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs. Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground. Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as

well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots. Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human bloodstains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

DISCUSSION

The Applicability of the 1996 Antiterrorism and Effective Death Penalty Act

On April 24, 1996 while Strickler's petition was pending, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L.No. 104-132, 110 Stat.1214 ("the Act") became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101-106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to petitions in capital cases.

Respondent asserts that the Act, which amends and adds to pre-existing law governing habeas corpus review, should be applied retroactively in resolving the issues presented by Strickler's petition. Strickler argues that the law in effect at the time he filed the petition should govern. Before addressing the substance of Strickler's claims, it is, therefore necessary to determine whether, and to what extent, the Act applies to Strickler's petition.

Chapter 154, New Habeas Corpus Provisions:

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt in" procedures: 1)the "post-conviction" procedure provided by Section 226 1; or 2) the "unitary review" procedure provided by Section 2265. The substantive changes this chapter makes to the law currently governing federal habeas review are summarized by the district court in *Hill v. Butterworth:*

> If a state opts in to the new habeas provisions, it receives several procedural benefits. First, petitions for habeas relief under Section 2254 must be filed in federal court within 180 days 'after final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2264(a). Second, federal district courts are limited to only considering 'a claim or claims that have been raised and decided on the merits in the State courts.' 28 U.S.C. § 2264. Third, adjudication of a petition subject to Chapter 154 must be given priority by the district court and court of appeals 'over all noncapital matters.' 28

> U.S.C. § 2266 (a). Fourth, reviewing courts are forced to expedite their review of habeas petitions brought under the Chapter 154. District courts must render a final judgment on a habeas petition within 180 days after the petition is filed, allowing the parties at least 120 of those days to brief the case and have a hearing on the merits. A court of appeals must hear and render a final determination of an appeal within 120 days after the reply brief is filed. 28 U.S.C. § 2266. Fifth, no amendment to a habeas petition subject to Chapter 154 is permitted after the filing of the answer to the petition, except on certain grounds set forth in § 2244(b). 28 U.S.C.§ 2266(b)(3)(B).

Hill v. Butterworth 1996 WL at *3 (N.D. Fla. Aug. 7, 1996).

The Fourth Circuit in *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) requires this Court to analyze Strickler's petition under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." See § 107(c). But, the Court of Appeals explained that the new provisions only affect habeas petitions if "the state has established procedures to ensure the appointment of qualified counsel to represent indigent petitioners in state post-conviction proceedings." *Id.* at 1342. Since, Virginia does not have a unitary review procedure, the Court must analyze whether Virginia meets the post-conviction review procedures and thus qualifies as an opt in state.

To qualify as an opt in state a state specifically must meet all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b)

2. Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b)

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c)

4. Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c)

Has Virginia Satisfied the Opt-in Requirements

Since July 1, 1995 the appointment of counsel for post-conviction capital cases is required under the Va. Code § 19.2-163.7. Between July 1, 1992 and June 30, 1995, however, the appointment of counsel in the post-conviction process was made upon request by the petitioner. Va. Code § 19.2-163.7 (prior to 1995 amendment). The Fourth Circuit has not decided whether Virginia's post-conviction appointment provisions qualify it as an opt-in state. The Court of Appeals did not reach the issue in *Bennett v. Angelone* because Virginia's system of post-conviction appointment provisions was set up "after petitioner's

Virginia habeas petition had been finally denied by the Virginia Supreme Court." *Id.* at 1342. Here, however, Strickler's state habeas petition was filed and denied by the Supreme Court of Virginia after Virginia's 1992 post-conviction system was in place. Thus, the Court must examine whether the procedures in effect when Strickler filed his petition, September 1992, satisfy the opt-in requirements.[2]

Judge Payne of the Eastern District of Virginia considered the issue in *Satcher v. Netherland*, No. 3:95cv261 (E.D. Va. October 8, 1996). Judge Payne concluded that Virginia was not an opt-in state because it post-conviction counsel mechanisms in place between 1992 and 1995 failed to meet three of the four requirements laid out by § 107. The Court agrees with the *Satcher* holding that while Virginia substantially complied with the Act's requirement for the time period in question it failed to adhere to the strict formal requirements of the Act.

Only since July 1, 1995 has Virginia required by statute the appointment of competent counsel to represent

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[2] There is some dispute as to which date courts should consider when analyzing the opt-in provisions. The Fourth Circuit in dicta suggests that courts should look at the system in place when the Virginia Supreme Court denied the petition. 92 F.3d at 1342. The district court in *Wright v. Angelone*, however, looked at the provisions in place when petitioner's state counsel was appointed. No. 2:96cv830 (E.D. Va. Oct 15, 1996). Since the provisions lay out the appointment of counsel the district court's approach seems the most logical. Under either method, however, the result is the same. Since Respondent picks the time of filing the state petition, the Court will look at the provisions in place at that time.

indigent petitioners in its post-conviction proceedings. Before that time, counsel was appointed at *petitioner's request*. Section 107, however, requires a statutory appointment mechanism that places an affirmative and automatic duty upon the State to offer competent post-conviction counsel to all prisoners sentenced to death. The Commonwealth's system in effect when Strickler filed his petition did not place such an affirmative duty upon the state. Thus while no indigent capital defendants have gone unrepresented in Virginia state habeas proceedings, the Court finds that the statute fails to meet the formal requirement of the Act. See *Wright v. Angelone*, action no 2:96cv830.

Furthermore, the Va. code does not provide for the compensation and reimbursement litigation expenses for such counsel. While Virginia substantially complies with the law by the General Assembly's appropriations acts that provide for the payment of such counsel it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." *Bennett*, 92 F.3d at 1342 n.2. This same conclusion was reached by the court in *Satcher*.

As the court in *Satcher* noted, "if Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." *Id.* Congress instead chose to confer the benefits only if states made a formal commitment to provide a post-conviction review system that protected

capital litigants' constitutional rights. *Id.* This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses fails to meet the standards established by § 107.

Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. While it substantially complies with the Act's provisions, its statutory scheme does not establish the rigid standards for providing counsel to indigent defendants or compensating the counsel. Therefore, it can not enjoy the "benefits" provided by the § 2261 of the Act.

Chapter 153 Amendments

Respondent argues that the general habeas provisions contained in Chapter 153 of the Act, §§ 101-106 apply to Strickler's petition. These procedures effect a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Unlike Chapter 154, they are not made explicitly applicable to petitions pending when the Act took effect. Nonetheless, the Commonwealth urges the retroactive application of the Chapter 153 amendments to Strickler's petition. This Court, however, agrees with the *Satcher* analysis and finds that the Chapter 153 amendments do not apply retroactively.

The Supreme Court most recently addressed the question of retroactivity in *Landgraf v. USI Film Prods.*, ___ U.S. ___, 114 S.Ct. 1483 (1994). In *Landgraf*, the petitioner sought the application of a new statute (Title VII of the Civil Rights Act of 1991) to cases pending on the date the new law was enacted. The Supreme Court rejected that interpretation and reaffirmed the presumption against retrospective application of statutes. *Id.* at 1503. The

Court explained that retroactive application of legislation is disfavored because

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. at 1497. In *Landgraf* the Court determined that when faced with the retroactivity question, a court must first determine whether Congress "has expressly prescribed the statute's proper reach." *Id.* at 1505. In the absence of clear congressional intent, a court must determine whether a statute would have retroactive effect, "i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505. If the court finds such a retroactive effect, the traditional presumption "teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

After examining the language of the Chapter 153 amendments the Court finds that the Supreme Court's analysis in *Landgraf* prohibits retroactive application of the Act. The language of the Chapter 153 amendments contains no express provision of retroactivity. Congress, however, clearly considered the issue when drafting the Act. Section 107(c) of the Act states that "Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act." The Act, however, contains no similar provision for the Chapter 153 amendments. *See*

Bennett v. Angelone, 92 F.3d at 1342-43. Congress' failure to include similar language for the Chapter 153 amendments reflects its intent that these provisions are not to apply retroactively. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Both the Second and the Tenth Circuits have held that the Chapter 153 Amendments are not applicable to pending petitions. *See Boria v. Keane*, 90 F.3d 36, 38 (2nd Cir. 1996) ("While Congress has spoken clearly in some portions of the new statute with respect to the application of the statue to pending cases, see, e.g., § 107(c), in the context of non-capital habeas cases the statute's silence is striking. This silence coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."); *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996).

The Court finds that provisions of Chapter 153 would definitely have a retroactive effect if applied to petitioner's case. Since Congress did not expressly state that they should be applied retroactively, the Court concludes that it must follow the traditional presumption against retroactive application. Thus the Court finds that neither the new Chapter 153 amendments nor the new Chapter 154 provisions apply to Strickler's petition. Therefore, the Court will analyze Strickler's claims based on the law governing federal habeas corpus review in effect at the time he filed his petition. *Strickler's Claims:*

In his federal habeas petition Strickler raises the following claims:

(A) Insufficiency of the evidence to support the verdict of capital murder

(B) Ineffective assistance of counsel

(C) Strickler did not receive the mental health expert assistance guaranteed by *Ake v. Oklahoma*

(D) Strickler's death sentence was arbitrary and capricious, and also disproportionate to the sentence received by his more culpable co-indictee

(E) Improper jury instructions violated Strickler's Sixth, Eighth, and Fourteenth Amendment rights.

(F) The trial court's failure to allow counsel to ask or inform jurors about parole

(G) The trial court erroneously limited voir dire about jurors' ability to show mercy and thus follow their oaths as jurors in considering a life sentence

(H) The trial judge's refusal to qualify jurors Almarode and Wills

(I) The trial judge's failure to excuse for cause jurors Ramsey and Brooks

(J) Strickler's rights under the Sixth, Eight and Fourteenth Amendments were violated when the commonwealth withheld exculpatory evidence

(K) The prosecutor knowingly presented false testimony at Strickler's capital murder trial

(L) Strickler was deprived of his rights to a fair trial and due process of law under the Sixth, Eight, and Fourteenth Amendments when the Commonwealth presented inconsistent testimony and argument on the evidence at the two trials

(M) Strickler is actually innocent of the crime and the sentence

(N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty

(O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by prosecutor's improper comments in opening and closing arguments

(P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eight, and Fourteenth Amendments to the Constitution

(Q) The death penalty is cruel and unusual and therefore is unconstitutional

(R) Vileness and future dangerousness under the Virginia death penalty statue [sic] are unconstitutionally vague

(S) The evidence was insufficient to establish either future dangerousness or vileness

(T) Juror misconduct

(U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution

(V) Ineffective assistance of appellate counsel

The Commonwealth contends that most of Strickler's claims are procedurally barred and those that are not lack merit. As a preliminary matter the Commonwealth does not dispute that Strickler has exhausted his state remedies and his claims are thus properly before this Court.

A. Insufficiency of the evidence to support the verdict of capital murder

Strickler first claims that there was insufficient evidence to convict him of capital murder. Respondent concedes that there are no procedural difficulties with this claim. Under Virginia's triggerman statute, only the immediate perpetrator of a crime may be convicted of capital murder. A conviction based on circumstantial evidence regarding who did the actual killing must "exclude every reasonable hypothesis of innocence." *Rogers v. Commonwealth*, 410 S.E.2d 610, 627 (1991).

The Virginia Supreme Court found that there was sufficient evidence to convict Strickler of capital murder. Under § 2254(d) the state court's findings are presumed to be correct unless they fall under one of the listed eight factors. In this case the Virginia Supreme Court relied on misstatements of the record and thus lose [sic] their presumption of correctness under § 2254(d)(8). The state court improperly stated Donna Tudor's testimony about

the condition of Strickler's clothing and ignored testimony of other individuals at Dice's Inn who did not describe Strickler as wearing such stained clothing that night. The Supreme Court also misstated the forensic evidence. It ignored critical testimony about additional hairs near the victim which were not Strickler's; and the expert's inability to match the semen found in the victim's body with any individual.

The jury undoubtedly had sufficient evidence to conclude that Strickler was present at the crime. The question here, however, concerns the sufficiency of the evidence to support its determination that Strickler actually committed the killing and was not an observer or accomplice. While the Court believes the inquiry is not easy; it finds that Strickler is entitled to an evidentiary hearing on the claim and that it should not be dismissed.

B. Ineffective assistance of counsel

Petitioner claims that his trial counsel rendered him ineffective assistance of counsel both during the guilt and to sentencing phases. Petitioner enumerates many instances of purported ineffectiveness, some of which respondent claims are procedurally defaulted.

The standard for ineffective assistance of counsel is set up in *Strickland v. Washington*, 466 U.S. 668 (1983/4). In *Strickland*, the Court set up a two pronged inquiry to assess counsel's performance. In order to prove ineffective assistance, a petitioner must show that counsel's performance fell below minimum standards while overcoming a strong presumption towards reasonableness.

Not only do petitioners have to prove deficient performance, they must also show that counsel's errors prejudiced them. The Supreme Court defined prejudice as a reasonable probability that counsel's errors undermined confidence in the outcome of the trial.

Strickler raises numerous instances of ineffective assistance that he claims rise to the *Strickland* level. After reviewing his various allegations, the Court finds that this claim should not be dismissed and that Strickler should be granted an evidentiary hearing on the issue to resolve genuine issues of material facts. The failure of Strickler's counsel to pursue a voluntary intoxication defense is procedurally barred, but the other components of his claims pass the procedural hurdles. While some of counsel's alleged ineffectiveness do not by themselves rise to the Strickland level, when examined all together, they present a genuine issue of material fact as to whether counsel performed ineffectively.

C. Failure to provide effective assistance under *Ake v. Oklahoma*

In *Ake v. Oklahoma*, the Supreme Court held that a defendant in a capital case must have the assistance of a competent, effective and independent mental health expert. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Respondent correctly notes that Petitioner has procedurally defaulted on this claim because it was never raised on direct appeal. Petitioner claims that this claim is reviewable under *Sawyer v. Whitley*, 505 U.S. 333 (1992). Under *Sawyer*, a federal habeas petitioner may "pass through the gateway" and argue the merits of an otherwise defaulted

constitutional claim arising out of an error at sentencing if the petitioner can demonstrate by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law. *Id.* Petitioner argues that a competent and effective mental health expert could have made "a persuasive case to defeat the finding of future dangerousness." The Court finds that Petitioner does not meet the *Sawyer* test. Petitioner was evaluated by a social worker, Dr. Warren who his counsel chose not to call. Furthermore, the Commonwealth presented much evidence on the question of future dangerousness, and it would be impossible for Petitioner to demonstrate by clear and convincing evidence that an independent mental health expert testimony would have prevented any reasonable juror from finding him eligible for the death penalty.

D. The death sentence was arbitrary capricious and disproportionate.

Petitioner argues that his sentence should be overturned because it is "excessive and disproportionate." Respondent contends that this claim is procedurally barred under *Slayton v. Parrigan*, 205 S.E.2d 680 (1974). The problem with Respondent's position, however, is that Petitioner could not argue that his sentence was disproportionate based on the evidence brought out in Henderson's trial until that trial took place. Thus, he could not argue this claim on direct appeal. The Court finds that this claim is not procedurally defaulted. The evidence at

Henderson's trial including his admission that he committed the murder provides a basis for a hearing that Strickler's sentence was disproportionate to the crime.

E. Improper Jury instructions violated Strickler's Sixth, Eighth and Fourteenth Amendment rights.

Petitioner alleges that various jury instructions by the state court provide a basis for habeas relief. The Court finds that the jury instructions do not alone provide a basis for relief. The state court's burden shifting instruction on malice does not rise to the level of a constitutional violation. In *Peterson v. Murray*, 904 F.2d 882 (4th Cir. 1990) the Fourth Circuit found the exact same instruction permissible. The failure to instruct on mitigating circumstances and the state court's instruction on an improper predicate are procedurally barred. Strickler argues that trial counsel's failure to object constitutes cause and prejudice for the default. The Court does not find that trial counsel's failure to object to two instructions undermines confidence in the verdict sufficient to meet the cause and prejudice standard.

F. Trial court's failure to allow counsel to ask or inform jurors about parole

Strickler argues that this failure to inform jurors about his parole ineligibility violates the Eight Amendment's requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death] penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). In *Skipper v. South Carolina*, 476 U.S. 1 (1986) the Supreme Court held

that mitigating evidence should be defined broadly; its definition would include evidence of parole ineligibility. The Court does not dismiss the claim.

G. Trial court erroneously limited voir dire about juror's ability to show mercy and thus follow their oaths as jurors in considering a life sentence.

The trial transcript reveals that Petitioner's counsel conducted extensive voir dire of the jurors. The trial court prohibited counsel from asking one question about mercy. The Court finds that the inability to present this one question to the jurors does not constitute a constitutional violation. Therefore, this claim is dismissed.

H. Trial judge's refusal to qualify jurors Almarode and Wills.

Juror Wills stated that he could not impose the death penalty under any circumstances; thus he was properly barred from serving on the jury. Similarly, juror Almarode said that she could not vote to convict if she knew there was a possibility that Petitioner would receive the death sentence. The Court finds that the trial judge properly refused to qualify these jurors based on their opposition to the death penalty and dismisses this claim.

I. Refusal to excuse for cause jurors Ramsey and Brooks

The Virginia Supreme Court found that these two jurors were impartial. The Fourth Circuit in *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) found that such a determination is entitled to federal court deference. The

Supreme Court of Virginia found ample evidence existed to support the trial judge's determination of impartiality and this Court defers to its ruling. This claim must be dismissed.

J. Violation of Strickler's Sixth, Eighth and Fourteenth amendment rights when Commonwealth withheld exculpatory evidence.

Petitioner contends that the Commonwealth withheld exculpatory impeachment evidence about Ann Stolzfus and Donna Tudor. The Commonwealth failed to disclose interviews and letters of Stoltzfus that contradicted and impeached her trial testimony. In her initial police interviews and subsequent letters to the police, Stolzfus could not identify Strickler as the man she saw in the car at the mall, could not identify Whitlock, and only described Whitlock's car and license plate number after viewing the seized vehicle at the police impound lot.

Respondent argues that this claim is procedurally barred. Petitioner states that the Court can hear his claim because his trial counsel's ineffectiveness for failing to file a *Brady* claim constitutes cause and prejudice for his default. "An attorney's effectiveness may constitute cause for excusing a procedural default when a petitioner has a constitutional right to effective assistance of counsel and when that assistance is constitutionally ineffective under the standard established in *Strickland v. Washington.*" *Smith v. Dixon*, 14 F.3d 956, 973 (4th Cir. 1994). The Court finds that the failure of Strickler's trial counsel to pursue a *Brady* motion constitutes cause for the default. Since Stoltzfus was the main witness to place Strickler at the

mall and with Whitlock, his inability to use impeachment material prejudiced him. Accordingly, the Court grants him an evidentiary hearing on his claims.

Petitioner also claims that the Commonwealth withheld impeachment testimony about Tudor. Tudor's first comments to the police fail to mention all the incriminating details about Strickler that she testified to during trial. Petitioner alleges that Tudor had a motive to fabricate her testimony in exchange for immunity on a pending grand larceny charge. Respondent claims that this claim is also procedurally barred; Petitioner asserts the same cause and prejudice argument he made about Stolzfus. The Court does not believe that Tudor's inconsistencies truly prejudiced Strickler, thus it believes the claim is procedurally defaulted.

K. Prosecutor knowingly presented false evidence at trial.

Petitioner argues that the prosecution knew that Stoltzfus manufactured her testimony and thus by allowing her testify they permitted false testimony to be presented in court. Petitioner does not allege that the prosecution knowingly allowed Stoltzfus to lie on the stand. Instead, he is suggesting that since her testimony changed over time, prosecutors knew that her trial testimony could not be true. While the Court believes there may be some merit to the suppression of this impeachment testimony, it does not believe it rises to prosecutorial misconduct as alleged here. This claim must be dismissed and the Court need not reach the procedural default issue.

L. Right to fair trial

This claim has no merit. The prosecution must present the best case it can. The cases Strickler cites in support of this claim describe much more egregious behavior than the behavior at issue here. For the Henderson and Strickler trials, the prosecution was just adopting different trial strategies based on the different cases it had to prove. Such actions do not constitute a constitutional violation.

M. Strickler actually innocent of the crime and sentence

Respondent states that this claim is procedurally barred. Petitioner claims that actual innocence overcomes procedural default under *Schlup* and *Sawyer*. While these two do support a "loop hole" for actual innocence, they establish a very strict standard that is rarely met. In *Schlup*, the Supreme Court held that for a habeas petitioner to pass through the "gateway" and have the federal habeas court reach the merits of his defaulted claims: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 867.

Petitioner presents new evidence which he claims shows his innocence. He submits the sworn testimony of Jeffrey Woods at Henderson's trial that Henderson admitted he, not Strickler, dropped the rock on Whitlock. He additionally states that Henderson's hair samples were like the hairs recovered from various clothing found at the scene. Henderson's PGM subtype was consistent with that found in vaginal and rectal swabs taken from the victim. Lastly, forensic evidence developed since

Strickler's trial indicates that Whitlock probably died of strangulation and not from head injuries.

Petitioner's new evidence does not meet the *Schlup* standard. Petitioner's evidence only goes to the question of who actually committed the murder. Balanced against the new evidence that points to Henderson's guilt, is the evidence presented by the Commonwealth at Strickler's trial. An eyewitness saw Strickler abduct the victim, his shirt contained traces of human blood and semen, semen was found in the victim's body; Strickler's hair was found near the victim's body, he retained possession of the victim's credit cards, he took her car and made statements about kicking the victim in the head and being a " 'rock crusher." Thus this new evidence does not make it more likely than not that a reasonable juror would conclude that Strickler was not guilty. The Court will dismiss this claim.

N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty.

Respondent states that this claim is procedurally defaulted under *Slayton v. Parrigan*. As Petitioner correctly points out, however, he could not have pointed out errors in the appellate process until the appellate process was over. He argues that the Virginia Supreme Court failed to compare cases where the defendants received life with those cases where the defendants received death. He also argues that the court failed to compare mitigation evidence in various cases; lastly, Strickler

argues that the court's review relied on incorrect statements of evidence at trial. Petitioner brought this claim up on state habeas which was his first opportunity to challenge the Virginia Supreme Court's actions. This claim is properly before the Court, and the Court will grant Petitioner an evidentiary hearing on the claim.

O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by the prosecutor's improper comments in opening and closing arguments.

The Court agrees with respondent that this claim is procedurally barred under *Slayton*.

P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Respondent argues that this claim is procedurally defaulted. Petitioner argues that the claim is reviewable under *Sawyer v. Whitley*. *Sawyer* requires a petitioner to prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty. The jury relied on numerous pieces of evidence to find Strickler eligible for the death penalty. They looked at his behavior before, during and after the killing of Whitlock as well as his continuing criminal activity. Assuming arguendo that the Commonwealth did improperly introduce Strickler's conviction, the jury still had sufficient other evidence to

support its finding of future dangerousness. The Court dismisses this claim.

Q) The death penalty is cruel and unusual and therefore unconstitutional.

The Court dismisses this claim because it is without merit. *See Gregg v. Georgia,* 428 U.S. 153 (1976) (when proportional to the severity of the crime and not a wanton infliction of pain the death penalty is constitutional)

R) Vileness and Future Dangerousness under the Virginia Death Penalty statute are unconstitutionally vague.

In this claim, the Petitioner asserts that the "future dangerousness" aggravating factor under Virginia law is unconstitutionally unreliable and vague. Respondent correctly notes that Petitioner has procedurally defaulted on this claim.

Petitioner purports to evade the procedural default by arguing that the claim is reviewable under *Schlup* and *Sawyer.* The Court concludes that this claim does not meet this standard and is dismissed.

S) Evidence was insufficient to establish either future dangerousness or vileness

This claim is similar to the insufficiency of the evidence argument raised in claim A. The Court will grant an evidentiary hearing on this claim.

T) Juror misconduct

Respondent correctly notes that this claim is procedurally barred. Petitioner contends that he met the procedural hurdle by raising the claim in his state habeas. Since he did not, however, raise it on direct appeal, the Court finds this claim barred under *Slayton.*

U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution.

This claim survives the motion to dismiss and the Court will grant an evidentiary hearing on those matters it has not ruled are procedurally barred.

V) Ineffective Assistance of Appellate Counsel

In Claim V the Petitioner asserts that he was rendered ineffective assistance of appellate counsel because he did not receive an accurate record of the proceedings. The Court finds that this claim is not procedurally defaulted, but that it lacks merit. Accordingly, the claim must be dismissed.

An appropriate order will follow

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

DEC 10 1996
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, WARDEN Respondent.	)	

ORDER

(Filed Jan. 16, 1997)

The Court is in receipt of Respondent's motion to alter or amend its judgment of December 10, 1996. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is ADJUDGED and ORDERED that the Court grants respondent's motion with respect to claims A, D, F, N, and S.

The Court grants an evidentiary hearing on petitioner's claims B, J. and U.

Let the Clerk send copies of this Order to counsel of record.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

Jan. 16, 1997
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, WARDEN Respondent.	)	

MEMORANDUM

The Court is in receipt of respondent's motion to alter or amend its judgment of December 10, 1996. In its Order, this Court granted petitioner an evidentiary hearing on claims A, B, D, F, J, N, S, and U. Respondent contends that these claims either have no merit as a matter of law, fail to raise a cognizable federal issue or raise only pure legal issues for which an evidentiary hearing is unnecessary.

Claims A and S: Sufficiency of the Evidence to Prove Capital Murder, Vileness and Future Dangerousness

Upon reconsideration, the Court will dismiss these two claims as lacking merit. After further examination of the record, there is enough evidence to support the jury's determination that Strickler committed the capital murder. The Commonwealth presented testimony and evidence that Strickler was present at the murder scene; his shirt contained traces of human blood and semen; his

hair was found near the victim's body; he stole the victim's car and credit cards; he made statements about kicking the victim in the head and being a "rock crusher." The jury had enough evidence to support its finding that Strickler alone committed the murders.

The evidence on the record also supports a jury's determination that Strickler jointly participated in the killings and thus his conviction for capital murder is permissible under Virginia's "triggerman" rule. It was reasonable for the jury to conclude that the victim was bludgeoned to death and not strangled; the evidence about the rock's weight and that one man was needed to hold Whitlock down supports a finding that two men were needed to accomplish the act.

Similarly, the jury's determination of vileness and future dangerousness is also reasonable and supported by the record. Accordingly, the Court will dismiss these two claims.

Claim B. Ineffective Assistance of Counsel

The Court reaffirms its grant of an evidentiary hearing to the petitioner on this issue. Petitioner has not had a hearing on this issue in state court, and thus he has never had the opportunity to fully develop his claim. Petitioner has alleged numerous new facts in support of his ineffectiveness claim, and pursuant to 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963), this Court may grant him a hearing to develop his claim.

Claim D. Arbitrary, Capricious, and Disproportionate Death Sentence

The Court will dismiss this claim because it is essentially a proportionality claim. While *Pulley v. Harris*, 465 U.S. 37 (1984) does not ban all proportionality claims, in the case at bar, Strickler has not presented a constitutional claim.

Claim F. The Meaning of Parole and a Life Sentence

Contrary to respondent's contention, this claim[1] is not procedurally barred. Petitioner raised it on direct appeal and on state habeas. The Court, however, believes that the information Petitioner sought to present to the jury does not constitute a constitutional violation of the Supreme Court's requirement that sentencing authorities consider all mitigating evidence. *See McClesky v. Kemp*, 481 U.S. 279 (1987). The Court will deny an evidentiary hearing on this issue because this claim seeks an impermissible retroactive application of a new rule. Petitioner's claims is analogous to *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) (Capital defendant allowed to rebut evidence of future dangerousness with proof of parole ineligibility.). The fourth Circuit in *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) held that the *Simmons* holding

[1] The Court understands that Petitioner's claim is not that he is "parole ineligible," but rather that he should have been able to inform jurors that no one who has been convicted of capital murder but sentenced to life imprisonment has ever been released on parole. Petitioner also argues that he was not able to ask jurors what a life sentence actually meant to them.

was a new rule that could not be applied retroactively.[2] Accordingly, the Court will dismiss this claim.

Claim J. The Commonwealth Withheld Exculpatory Evidence

The court affirms its grant of an evidentiary hearing on the prosecution's failure to disclose exculpatory and impeachment evidence concerning witness, Ann Stoltzfus. Petitioner has demonstrated cause for his failure to raise this claim earlier. Defense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings.

Claim N. Inadequate and Meaningless Appellate Review

The Court will dismiss this claim. Petitioner challenges the appellate review in his own case. His claim, however, is procedurally defaulted because he did not raise it in his petition for rehearing before the Virginia Supreme Court.

Claim U. Denial of the Right to a Fair Trial

The Court has ordering [sic] a hearing on a several claims dealing with trial errors. Given their nexus to this claim, the Court will deny the motion to dismiss Claim U and allow a hearing to proceed.

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[2] The Court is aware, however, that the Supreme Court has granted review in *O'Dell* on this issue of whether *Simmons* constitutes a new rule. *O'Dell v. Netherland*, ___ S.Ct. ___, 1996 WL 716301 (12/19/96.).

The Court will dismiss claims A, D, F, N, and S. An appropriate Order will follow.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

January 16, 1997
DATE

August 26, 1997, Attachments to Petitioner's Motion For Summary Judgment in federal district court

ATTACHMENT ONE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v.

Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

CAPTAIN DAN CLAYTOR, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Captain Dan Claytor, Harrisonburg Police Department, 181 South Liberty Street, Harrisonburg, VA 22801 (540) 434-2433.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I recall speaking with Stoltzfus on January 19, 1990, January 22, 1990, January 24, 1990, January 25, 1990 and February 1, 1990.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I summarized my interviews with Stoltzfus and these summaries are in possession of the Harrisonburg police department.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received letters/summaries from Stoltzfus and these letters/summaries remain in the Harrisonburg police department file.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ Dan Claytor
DAN CLAYTOR

Subscribed to and sworn before me, a Notary Public, this 22nd day of April, 1997.

/s/ Sarah L. Fairweather
Notary Public

My commission expires: March 31, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v. Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

A. LEE ERVIN, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in

the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: A. Lee Ervin, Augusta County Commonwealth's Attorney, 6 East Johnson, 3rd Floor, Staunton, Virginia 24401.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I spoke with Stoltzfus sometime prior to Strickler's trial but cannot recall the specific date. I was accompanied by Lt. Campbell.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting my conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ A. Lee Ervin
A. Lee Ervin

Subscribed to and sworn before me, a Notary Public, this 25th day of April, 1997.

/s/ Patty B. Campbell
Notary Public

My commission expires: August 31, 1999.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v. Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

LIEUTENANT A. McDORMAN, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Lt. A. McDorman, Harrisonburg Police Department, 181 South Liberty Street, Harrisonburg, VA 22801, (540) 434-2433.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I believe I may have spoke with Stoltzfus on the telephone but I do not recall the date.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting any conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ Al McDorman
A. McDorman

State of Virginia
City of Harrisonburg

Subscribed to and sworn before me, a Notary Public, this 28th day of April, 1997.

/s/ Sandra Claytor Baer
Notary Public

My Commission expires: February 28, 1999.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v.

Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

LIEUTENANT WILLIAM C. CAMPBELL, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann

Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Lt. William C. Campbell, Augusta County Sheriff's Department.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I spoke with Stoltzfus sometime prior to Strickler's trial but cannot recall the specific date. I was accompanied by A. Lee Ervin.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting my conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ William A. Campbell
William A. Campbell

Subscribed to and sworn before me, a Notary Public, this 29 day of April, 1997.

/s/ Debra W. McQuain
Notary Public

My commission expires: 9/30/99.

ATTACHMENT TWO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	Case No. 3:95-CV-924

CITY OF STAUNTON
COUNTY OF AUGUSTA

AFFADAVIT OF WILLIAM E. BOBBITT, JR.

William E. Bobbitt, Jr., being duly sworn, states as follows:

1. I am the Public Defender for Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro, and Buena Vista. In that capacity, I was assigned to represent Tommy David Strickler in his capital murder trial in Augusta County.

2. The jury trial was conducted in June, 1990, in Augusta County. I was assisted by Thomas E. Roberts, then a part-time Assistant Public Defender.

3. Prior to trial, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County. The prosecutor had an open file policy, and I had access

to these files on more than one occasion. I was permitted to make copies of any materials.

4. I have reviewed the attached Exhibits 1-7 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

5. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I do not have copies of any of the material contained in Exhibits 1-7.

6. I have reviewed my cross-examination of Anne Stoltzfus during Strickler's trial. My cross-examination questions do not rely on any of the materials in these exhibits. I conclude that none of these materials were in the Commonwealth's files when I examined them.

7. I first learned these materials existed when they were shown to me sometime in 1997.

8. The material in Exhibits 1-7 provides powerful impeachment material and should have been disclosed to me pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

9. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

10. The notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in a number of respects.

11. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman in the car at the mall, and Stoltzfus provided no description of her clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [Whitlock's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as "a rich college kid," "singing" and happy. Stoltzfus described the clothing she was wearing. These inconsistencies were material for cross-examination.

12. When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could *not* positively identify Stickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr.

478-49. Stoltzfus was also unable to make a positive identification of Henderson from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews stated the opposite.

13. In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of the physical features and clothing of the white woman accompanying them. Ex. 7.

14. Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of to all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor

information that never appeared in any of his notes, i.e., she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information would have been very effective in destroying her credibility with the jury.

15. Claytor's handwritten notes of January 19, 1990, contain no mention of Stoltzfus's encounter with Strickler and Henderson in the music store. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white women inside the mall. The woman bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her encounter in a music store with Strickler and Henderson. Stoltzfus later gave this testimony at trial. In the January 22 letter, Stoltzfus states she is uncertain that the man she saw in the mall is even the same man that she later saw approach Whitlock's car. Ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> *I have a very vague memory that I'm not sure of.* It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(Emphasis added.)

The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered

> driving on past Leggetts and not going in. I placed the time around 9:00 pm *thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no Purchases.* Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(Emphasis added.) Once again Stoltzfus admits that she had not remembered being in the mall that night. Her "memory" is based on what her daughter has told her. Stoltzfus's letters and notes to Det. Claytor provided devastating impeachment material, casting doubt on all of her testimony.

16. There are additional inconsistencies. In Stoltzfus's first police interviews, Whitlock's car was described as "dark blue" with West Virginia tags. In notes labeled "Observations" dated January 19, 1990, and illustrated with diagrams, the car is described as a "dark blue, 'new' sports car West Va. tags." Ex. 3.

17. On January 24, 1990, a police report indicates that Stoltzfus was taken to the police impound lot to view the car. Ex. 2. After viewing the car, she was able to recall the license number, NKA-243, and other details about the car.

18. The letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> *Thank you for your patience with my sometimes muddled memories.* I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really

didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, *I never would have made any of the associations that you helped me make.*

(Emphasis added.) Stoltzfus did not remember the events that she testified about. Her story was apparently developed with the assistance of the police, after viewing the evidence and photographs, and after hearing discussions of the crime on campus.

19. Additional impeachment material is contained in Exhibits 1-7 which is not set forth here.

20. In sum, the suppressed documents satisfy the requirements of *Brady* and *Kyles* for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, at 1566, quoting *Bagley*, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to Strickler's trial counsel.

Further, affiant sayeth not.

/s/ William E. Bobbitt, Jr.
William E. Bobbitt, Jr.

Sworn to before me this
19th the day of August, 1997:

/s/ Linda H. Majer, Notary Public
My Commission Expires: July 31, 2001.

EXHIBIT ONE

transcription of handwritten note

Anne E. Stoltzfus
565 Hartman Dr
H'bg Phone #434-2775

172-36-8187 Car may have been in front of car

1-19-90 Daughter with Katty

1:00 PM 6:00-7:30 P.M. (Illegible) 6:30 P.M.

Left K-Mart t Mall
startled
Pounds window/ Jumped In (Middle Fighting
Backs out/Guy Motion
Girl runs out & guy
Car lurches – horn

Girl (illegible)
Guy in back (illegible) over

Ran over curb
Can't ID B/F
1st W/M
Can ID W/F 5'05" – 140 (Little over weight) Blue Jean
Brown Hair shoulder Plain Face (Pail)
2nd W/M Tall – Dark Hair
Cream Jacket

3:30 PM Show Photo Lineup – Abduction

#6266 – 4663 – 5992 – 4199 – 5976

Henderson
Resemble
#6/Not Sure
Maybe if in person
Beard Not Right

5031 – 4787 – 5900 – 6186 – 6337-5906

Resemble
Strickler
w/m (illegible)
Hair color not right

EXHIBIT TWO

CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D. L. CLAYTOR

Summary of Interview: Anne E. Stoltzfus
565 Hartman Drive
Harrisonburg, Va. 22801
Phone # 434-2775
SSN/172-36-8187

On 1-19-90 and 1-22-90, Anne E. Stoltzfus was interviewed at the city police department after she advised that she recalled seeing some suspicious activity which might pertain to the LeAnn Whitlock case.

Ms. Stoltzfus advised that on Friday evening, 1-5-90, she was at the Valley Mall and observed a subject jump into a vehicle with a black girl, fight with the black girl,

and then was joined by two other subjects. Ms. Stoltzfus stated that between 6:45 p.m. and 7:00 p.m. she and her daughter had completed their shopping and were leaving the mall, when she observed a black girl in a dark blue car coming into the mall parking area. Ms. Stoltzfus advised that she was sitting at the stop sign at the Penneys end of the mall (west end) when the black girl passed traveling east in front of the mall. Ms. Stoltzfus noted that she then turned right and fell in behind the black girl's vehicle and noticed that it had West Virginia tags. As they approached the front entrance of the mall, the vehicle stopped for what she thought was a bus or some type of vehicle. Ms. Stoltzfus advised that she observed a white male, long scraggly hair, run up to the passenger window of the black female's car and started pounding on the window and attempting to open the door. The subject appeared agitated and wild. He pulled open the door and jumped in next to the black female and got right up next to her. The black female started hitting the guy. The guy then turned and motioned and a white female and a second white male ran from the entrance area to the car. The female was described as 18-21 years of age, 5'5", 140 lbs., (A little over weight), blonde/brown shoulder length hair, pale plain face, wearing blue jeans and denim jacket. The second white male was described as tall, 6', dark hair, cream colored jacket.

Ms. Stoltzfus advised that as the white girl attempted to crawl into the back seat the car lurched forward and the horn started blowing continuously. The girl jumped back and the second white male ran back to the entrance of the mall. The black female and the first white male started fighting again, until the horn stopped blowing.

The white female and the second white male then got into the back seat of the vehicle.

Ms. Stoltzfus stated she pulled up beside the vehicle to see if the black girl was ok but could not get her attention. The black girl just stared forward. At the same time she noticed that the white female in the back was staring back at her and the white male in the back seat was attempting to hide down in the seat. Ms. Stoltzfus advised that she moved forward a little and looked back at the black girl, still trying to get her attention. She noted that the black girl was glancing her way but still did not turn her head, and was mouthing something which in thinking back could have been "help". Ms. Stoltzfus advised that she drove up to Medco and pulled over to see if the black girl was ok. The car drove past her and everything seemed ok. However, when the vehicle got up to Leggetts Store it drove up over the curb and the horn again started blowing. The vehicle continued on and was last seen heading toward Rt. 33.

Ms. Stoltzfus advised that she was not sure whether she could identify the white males but felt sure she could identify the white female. She further advised that prior to the incident in front of the mall, she recalled seeing who she thinks were the same blondish haired male and white female inside the mall. The white female bumped into her because the white male, who again appeared agitated or high, was yelling at her to get someone (she could not recall who) to meet him at the bus stop. Ms. Stoltzfus advised that the incident occurred very quickly and that her daughter did not see anything.

Anne E. Stoltzfus was shown the following picture show-ups after first reading the Photographic Show-Up Admonition:

6266, 4663, 5992, 4199, 5976, R.C.S.D. # 12527. Ms. Stoltzfus pointed out R.C.S.D. # 12527, Ronald Henderson as resembling the subject described as white male # 2. Ms. Stoltzfus advised that it looked like the subject but the beard was not right. She noted that if she saw him in person she might be able to identify him positively.

Photo Show-Up # 5031, 4787, 5900, 6186, 6337, 5906. Ms. Stoltzfus pointed out picture # 6337, Thomas David Strickler, as resembling the subject described as white male # 1. Ms. Stoltzfus advised that the hair color was not right in the photo. She advised further that she might be able to identify him positively if seen in person.

CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D.L. CLAYTOR

1-24-90 Approximately 6:25 p.m. Anne Stoltzfus was shown a photographic show-up including photos # 5346, 5351, 9107, Connie Lamb photo, R.C.S.D. 9771, and 5676. Ms. Stoltzfus first read the photo show-up admonition and after viewing the photos advised that she could not identify any of the photos as the female who she observed enter Ms. Whitlock's car. She advised that if she saw the subject in person she would know for sure.

1-24-90 Approximately 7:10 p.m. Ms. Stoltzfus was taken to the county impound lot where she viewed the Mercury Lynx, W. Va. license NKA-243. Ms. Stoltzfus advised that the vehicle

looked like the one at the Valley Mall. she stated that it was the right color, size, and it had the same little blue stripe down the side, and had the same colored interior as the one she saw.

1-25-90 Anne Stoltzfus advised that she had seen photographs of LeAnn Whitlock and, without a doubt, she was the black female that was operating the blue vehicle with West Virginia tags who she observed at the Valley Mall on 1-5-90. Ms. Stoltzfus further advised that the vehicle she viewed on 1-24-90 was the vehicle she saw at the mall. She had made up a quote to help remember the license number after the incident, "No Kids After 2-43".

2-1-90 Approximately 9:30 a.m. Anne Stoltzfus, accompanied Detective Claytor to the Rockingham District court to attempt to identify the female she saw on the evening of 1-5-90 with Tommy Strickler and Ronald Henderson. Ms. Stoltzfus observed a female known as Mary Jane Oplander and stated that Oplander looked like the girl she saw on 1-5-90.

EXHIBIT THREE

Observations

[Diagrahm Omitted In Printing]

1.) Black girl parked in front of valley mall Entrance in dark blue "new" sports car West VA. tags. Scroungy "bum-type", "W.Va. hick" with long scraggly blondish

hair (male) runs to passenger window, pounds impatiently, then opens door & jumps. (A *girl & guy* leaning against outside wall; A few people inside Mall Entrance.

[Diagram Omitted In Printing]

2.) Black girl starts hitting the guy in her car. He backs out (part way) and waves to the girl & guy).

3.) The girl & guy # 2 run towards car. Girl puts one leg inside car, car lurches forward, & driver honks horn continuously. The girl (avg. ht. – 140lb, blue j., lt. brown hair, plain face, no make jumps back & the guy # 2 runs back toward wall.

4.) Guy # 1 & black girl start fighting again. She stops blowing horn and girl & guy # 2 (tall, dark hair, lt. cream jacket get into back seat & lean forward in a huddle with guy # 1.

Action: 5.) I drive around car & parallel to car. I look over to see if black girl is O.K. She just stares straight ahead. Girl in back seat stares at me. I feel uneasy but uncertain of my uneasiness. [Arrow Omitted In Printing].

6.) I drive on to Medco Drug & park to see if the black girl is O.K. [Diagram Omitted In Printing].

7.) She drives the car past me, around corner, & at curb marked X above drives up over curb & honks horn. I follow them. They look normal. They turn left to go out to 33 & I turn right to go out other direction.

EXHIBIT FOUR

565 Hartman Drive

Harrisonburg, Virginia 22801

January 22, 1990

Dear Sargeant Claytor:

I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped jog my memory. I have an extraordinary visual memory but I hadn't placed all my mental pictures together with that same night.

Katie remembered my only purchase at the Mall of 4 name cards at $0.75 each at Centerpoint. We both remembered our trek after Centerpoint, but I thought it was a different night. So I knew that if I could confirm that one purchase, all the associated mental pictures following would have occurred January 5. I did this morning confirm by Centerpoint bookstores' cash register tape a purchase of that amount at 4:40p.m. (showed 4:30-10 minutes slow). This means that I can construct with good confidence our exact journey and get more accurate time estimates.

I picked up Katie shortly after 4:15pm at the Medical Arts complex and headed to the Mall. We went first to Centerpoint bookstore to purchase a specific CD. They didn't have it and I purchased the name cards at 4:40pm and we left for K-Mart. I purchased a prescription and some

other merchandise at 5:31pm (confirmed by cash register tape and also back of check #1190). We left K-Mart and drove back over to the Penney's catalogue sales/ Watson's lot. From there we went to:

Approx. Time	Place	Specific Memories
5:40pm	Centerpoint	Check to see whether we could *order* CD They didn't know how; suggested we try Record Corner or Musicland
5:45pm	Record Corner	No luck
5:50pm	Musicland	Wasted 15-20 min. trying to get help to find the CD.
~6:05-6:10pm		Told to come back in about half an hour to find someone more knowledgable [sic].
~6:10pm	Watson's	Looked around for half an hour.
~6:40-6:45pm	Musicland	Got there, still had to wait 5-10 min. Another guy finally came and helped but was no help.

**On the way back to Musicland the 2nd time I remember a girl who looked just like the girl who got into that car bumped smack into me. She was walking toward me facing the other (Leggetts) direction. A revved-up mountain man was yelling at her that he would meet her out at the bus stop. He went around the display and up the B.

Dalton bookstore side and could have been the same guy who knocked on the car window because he had the same weird walk-like-an-animal gait. I remember looking at my watch and a gentleman who saw me asked me what time it was. I have a vague memory that my watch said 6:50 but is 5 min fast so I answered 6:45pm.

~6:50- 7:00pm	Centerpoint	Asked briefly when someone would be in so that I could place the CD order and was told tomorrow (Saturday) manager Abe Clymer.

Approx. 6:55-7:05pm Returned to car. Had discussion about ear piercing and I decided to take Katie to Leggetts to show her earrings for unpierced ears. **We drove around the front of J.C. Penneys, stopped at the stop sign, and the black girl in dark blue car drove past.** (I saw a car that looked somewhat like hers parked next to the railroad tracks across from Valley Heritage (a company car?) only it was lighter blue.) Then I turned right and pulled up behind the black girl, noticed the West. VA tags, and observed the other things I told you.

Observations that corroborate the time that I saw those 3 characters get in the black girl's car to about 6:55 to 7:10pm are Katie's and my combined memories on when we got back home. Katie remembers being mad because everyone had already eaten supper and I heated up some spaghetti sauce for her but refused to cook some noodles because it was so late. I remember the argument. My memory is that I said it was only 20 after 7, which may have been 7:15 because our dining room clock is 5 min.

fast. I also remember arguing that it would be close to 8:00 by the time I spent half an hour cooking noodles. She remembers being upset that she couldn't watch TV because her dad was still watching his news program (McNeil/Lehrer Hour: 7-8pm). This means we got home after 7pm, because the children watching TV during the 6:30-7:00 national news is never allowed. It also means we got home before 8pm. I drove home the "back way", which may have taken 10 to 15 min.

I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window.? Were those 2 memories the same person? The black girl couldn't drive when the bus pulled out because about 2-3 people coming from the parking lot walked in front of the car.

I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. That was corroborated by Centerpoint this morning, so I feel very certain about the above approx. times.

Sincerely,

/s/ Anne Stoltzfus
Anne Stoltzfus
172-36-8187

transcription of handwritten note:

P.S. 1) Katie doesn't remember seeing the 3 people get into the black girl's car, but she does definitely remember my pulling over at Medco Drug and explaining that I wanted to "make sure those people were O.K." She remembers that as she was looking backward and asking "Who?" I said "there they go – up over the curb" (around the corner of Leggetts).

2) Katie also had a specific memory of my buying the 4-75¢ name cards during the *first* visit to Centerpoint, which was corroborated by the Centerpoint register tape.

EXHIBIT FIVE

Notes for Detective Claytor:

My Impressions of "The Car"

(Anne Stoltzfus)

I remember the car as dark blue (navy) and shiny. The make was definitely not foreign but American. It was not a Subaru, Toyota, Mercedes, Renault, Peugeot, VW, or Honda. It was not a Buick or Cadillac. It was not a large, full-size car and not a mini car. I think it was smaller than a Buick Skylark and about the size of a Buick Skyhawk.

I can best describe the car in comparison to my VW Rabbit. The car was wider than my Rabbit, maybe two feet wider. It was higher than my Rabbit, maybe 3-6 inches higher. It was longer than my Rabbit, at least in front – by maybe a foot.

It was a standard boxy American style. [I remember looking for the make and not being able to see it in the dark. I have a *vague impression* of silver letters on the left rear that said *"Hollar"* beside or inside an oval emblem, but I'm not at all sure.] The lines of the car were straight and parallel to the road, i.e., the rear was not jacked up like many cars are. I *think* it was a two-door.

EXHIBIT SIX

1-25-90
1:45am.

Detective Claytor:

Tonight I identified beyond a shadow of a doubt that the black girl I saw 1/5/90 was LeAnn Whitlock. I spent several hours with John Dean looking at current photos from which I made the identification.

(Also his description of the girl in jail seems to pretty closely match mine.)

Thanks.

– Ann Stoltzfus

EXHIBIT SEVEN

January 26, 1990

Dear Detective Claytor:

As soon as I saw John Dean's pictures of LeAnn Whitlock. I knew beyond a shadow of a doubt that she was "the black girl" and then I remembered the license number. To realize that I actually witnessed LeAnn's abduction is terribly upsetting because I came so close to notifying the police and to doing a couple other things that could have made this totally different. Even when I saw the car, I thought it could have an exact duplicate with a different owner. (As long as I could block out the license number, I could believe that.)

I should be able to identify all three of the persons I saw get into that car if I saw them in person, because I not only saw them get into the car but two other times inside the Mall. I am sure they are the same people. The first time I saw them was about 6:00pm inside Musicland. I had been waiting for a very tall, black guy ("Ron"?) to wait on me and as soon as he was free these three people came in. Mountain Man was impatient and I instinctively backed up and almost into the dark-haired quiet guy. My entire left arm brushed a long tan light-weight coat of a synthetic fabric that was draped over his right arm. I told "Ron" to wait on them first. When "Ron" was done with them he disappeared and a girl told me to come back in half an hour. The reason I had to wait when I came back to Musicland was because "Ron" never returned. A short, brown-haired guy ("Bruce") waited on me. They might remember and be able to identify these characters for you.

As I was returning to Musicland I had the hefty blonde girl crash into me and almost get her button snagged on my open-weave sweater, as I had told you. I'm sure this is the same girl who got into that car. Her face was round, her hair dark-blonde, scraggly, straight-cut almost shoulder length. I think she had a few freckles and I think grey-blue eyes. She had a certain "not-too-bright" look. She looked like an anemic, dopey version of woman #3 (upper-right-hand corner) in that group of pictures you showed me. As she bumped into me Mountain Man was yelling at her "I have to get out of here. Where's Ronnie?" She turned and I turned and saw the dark-haired guy standing near the end of the display toward J.C. Penneys in a long tan trench-type coat. Mountain Man said, "You and Ronnie meet me at the bus stop." She said, "Where's the bus stop?" I said, "Up at the Mall entrance." I remember Mountain Man was multi-layered. The bottom layer was a grey T-shirt that I think had blue writing "Harley Davidson" on it. My impressions flow together but I'll describe them anyway. The outer layer had a colorful bird decorated on the back and I think red letters that said Fawley or Raleigh. In between layers were flowing, open in the front, and maybe longer than the outer layer. I think one layer was a faded denim-blue color shirt and another a greenish-greyish flannel shirt.

Another point of clarification. I think it was a white(?) pick-up truck that stopped ahead of us to turn left. I remember thinking, "They went in and parked and are now walking in front of the blue car while we're still sitting here waiting to go." Those people might remember the abduction. Also, when LeAnn laid on the horn there were 6 or 8 people inside the Mall entrance who looked

out to see what was going on. There were a couple people in the parking lot who stopped and looked. They might be able to identify these characters.

Back to "the girl" . . . I told you she was the same height as me (5'6"). But I forgot that I am shorter because of a spinal injury and vertebral collapse (spondylolisthesis). I measured myself this morning as 5'4". She would wear about a size 14 or 16 blouse and about size 16 jeans. [I have a crazy association of another girl who reminds me of this girl and probably is not. But I'll tell you anyway. December 1987 I was working at Leggetts at Valley Mall as a sales clerk. A girl who looked similar to this girl came in and tried to get a cash refund from me for merchandise she had just gotten in exchange for a $90 dress that had been stolen. I alerted security and detained her long enough for a hot-headed hick waiting for her in the car to come in and raise a ruckus.]

Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw LeAnn's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make. Now that I know what it was that I saw, I have been very upset and I really don't want to look at any pictures or people for a while. I need to be trying to study. I am really glad you left me in the dark all this past week, because otherwise I think I would have been too upset to remember anything. I want to cooperate

in your investigation and would be willing to help later on. It's just that right now I need a break. Thanks.

Sincerely,

/s/ Anne Stoltzfus
Anne Stoltzfus

EXHIBIT EIGHT

Details of Encounter with Mountain Man, Shy Guy, & Blonde Girl

My first encounter with Mountain Man was about 6:00 p.m. January 5, 1990. I was in Musicland at Valley Mall waiting to be waited on when he stormed in with Blonde Girl. I instinctively backed up and into Shy Guy. I remember touching the long tan coat he had draped over his arm and thinking that I felt something hard. I apologized and Shy Guy smiled slightly. As he quickly put on his coat and put his hands into his pockets, his soft brown eyes dispelled my fears. The tall black Musicland clerk (Ron or Rob) came over to wait on me and I told Mountain Man to go ahead since he was so impatient.

About 45 minutes later I saw Mountain Man again when he was coming toward me as I approached Musicland coming from the Centerpoint Bookstore direction at Valley Mall. Shy Guy had just walked past me and Blonde Girl was walking toward me several yards ahead of Mountain Man. Mountain Man was yelling, "Donna, Donna" very loudly, I asked Blonde Girl if she was Donna and she said, "Donna or Sharon". I said, "He wants you."

(I stopped in my tracks and watched Mountain Man because he was so revved up that I thought he was either manic or on drugs.) She turned around and Mountain Man said, "Where's Ronnie?" She said, "Up there", pointing toward Penneys. As Blonde Girl started walking, Mountain Man yelled, "I gotta get outa here. You and Ronnie meet me at the bus stop." She looked back and said. "Where's the bus stop?" and crashed into me. We both apologized and I then gave her directions to the bus stop. Then I promptly tried to follow Mountain Man up the other side of the display because I was concerned about his behavior, but I lost him and proceeded back to Musicland.

I spent about 5 minutes in Musicland, 10 minutes in Centerpoint Bookstore, and then went to my car in the Watson's/Penneys' lot. This was approximately 7:00 p.m. I was with my 14 year old daughter.

I drove in front of the west end of Penneys and stopped at the stop sign. A black girl in a nice shiny dark blue car drove in. She was singing. (I remember thinking. "Rich black college kid.") I turned the corner and stopped behind her at the Mall entrance. I noticed her West Va. tags and thought, "Rich black college kid from West Va." She had stopped because there were vehicles ahead of us. My memory is some sort of mini-bus was parked and waiting to leave. Mountain Man had come tearing out of the Mall, ran up to the bus and yelled at the driver, and then hit the back of the mini-van/bus as it drove off. I remember telling my daughter to look at "that madman". Ahead of the black girl was a pick-up truck, which was waiting to turn left. About this time Mountain Man ran up to her car (passenger side) and started yanking on the

door handle and yelling. He couldn't get the door open and started pounding on the window. She reached over to the door I believe to make sure it was locked, because Mountain Man tried again and was furious and didn't get it open until he shook and shook the door with both hands. He jumped into the car, smack up against her, and she crouched toward her door and started hitting him with her right arm. (I thought it was a domestic squabble. Mountain Man didn't look like he fit with her, but he did look like he came from West Va.) The Mountain Man leaned back over, opened the passenger door, and motioned to Blonde Girl and Shy Guy to come. They had been leaning up against the outside wall. Blonde Girl put one foot into the car and the car lurched forward and nearly hit the family from the pickup truck that had parked. The black girl laid on the horn for quite a while and Mountain Man kept hitting and hitting her until she stopped. (This caught the attention of 8-12 people inside and outside the Mall, but they all seemed curious at first and then unconcerned.) Then Blonde Girl got into the back seat and Shy Guy followed. He handed his tan coat to Mountain Man, who laid it down on the floor and fooled with it for a while. Blonde-Girl and Shy Guy sat front on their seats touching the black girl while Mountain Man was bent over (all buddies, I thought). As soon as Mountain Man sat up and came over against the black girl, the other two sat back and relaxed.

But the black girl wouldn't go, I tapped the horn and there was no response. (Now I was starting to get worried.) I pulled up beside them, exactly parallel, honked the horn to get her attention, but she sat there expressionless, like a mannequin. I jumped out of the car and

started to walk between the two cars to talk to her, but there wasn't enough room. Shy Guy looked scared and laid down on the back seat as if to hide. Blonde Girl kept staring at me. I got back into my car and pulled front so that the black girl had a complete view of me. I asked her three times. "Are you O.K.?" Each time she would meet my eyes and then purposefully look down to her right side. I was frustrated because she was expressionless and said nothing and seemed to intentionally look away. (I wonder now if there was a knife or gun at her side.) Finally, I pulled forward a bit more, honked the horn, and said again, "Are you O.K.?" This time she mouthed, "Help". I started to drive away and only when I reached Medco Drug did I realize that she was saying, "Help". I pulled over and told my daughter to run in to get security but about that time the black girl started driving past us. I had my daughter write down the license number on a 3x4 card – West Va./NKA – 243.

As the car went around the corner at Leggetts it went up over the curb. The car really tilted, the horn honked, people were hitting each other, and I thought the whole bunch of them must be drunk. My daughter and I followed them out to the stop sign. They sat for a while at the stop sign and they all seemed calm again. I told my daughter to help me remember, "No Kids Alone to (2) 43. 2+43 makes 45, my age." Then they turned left and got into the lane to head back into town. I was going to follow them, but they switched lanes to head out 33 East. I noticed I was almost out of gas and I am not familiar with that part of Rockingham County, so I drove back toward the telephones at the theatre entrance to call the police. (When I got there I realized all I could say was

some kids that looked like they were drinking and fighting and carrying on were driving out Rt. 33.) I rationalized away my bad vibes and decided to drive on home and get my family their supper.

So where is the 3x4 card?. . . . It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU. I was too busy to read the paper or listen to the TV news. I did learn at JMU that LeAnn Whitlock had disappeared from Valley Mall January 5, but I hadn't seen a black girl inside the Mall that night and didn't make the association. The following week it was a frequent topic of conversation in my classes. Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag. I remember the thought running through my mind. "The police won't find it there." My heart started racing and I said outloud. "What?! Am I paranoid?" But I still made no association.

Wednesday I saw a newspaper picture of John Dean's car, but I didn't *consciously* recognize it. The newspaper bothered me, so I put it on a pile of papers by the woodstove. The picture still haunted me and distracted me from studying. I finally tore it up and burned it in the woodstove.

Later Wednesday in one of my classes I was talking with Kim Davis and some other black students about LeAnn. I told her that I was at the Mall that night, but

that I didn't see any black girl inside the Mall. Then I told her about the crazy car in front of me. She reported that to the police. Thursday afternoon a detective came to my class and Friday I had to go to the police station to talk to Detective Claytor.

All weekend whenever I tried to get to sleep I was haunted by this nonsense chant, "No Kids Alone to 43." I still made no conscious association. I did know that it was unusual for me not to remember license numbers. Even later when I saw John Dean's car and recognized many of the details, the interior grey, etc., I could not recognize the license number. I did know that every time Detective Claytor asked me about the number I felt like I was going to cry. Later that night when I saw pictures of LeAnn and Knew she was the black girl in that car, I immediately knew the license number.

–Anne Stoltzfus

September 8, 1997, Attachments to Petitioner's Reply to Warden's Opposition to Motion For Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	Case No. 3:95-CV-924

CITY OF WAYNESBORO, VIRGINIA

AFFIDAVIT OF HUMES J. FRANKLIN, JR.

Humes J. Franklin, Jr., being duly sworn, states as follows:

1. I am an attorney, admitted to the Bar of Virginia, and my office is located at 129 N. Wayne Avenue, Waynesboro, Va.

2. In 1990, I was assigned to represent Ronald Lee Henderson in his capital murder trial. Henderson had been charged along with Tommy Strickler in the abduction, robbery and murder of Leeann [sic] Whitlock. The indictment was brought in Augusta County and subsequently transferred on defendant's motion to the Circuit Court for the City of Winchester.

3. The jury trial was conducted in March, 1991, before Judge Bumgardner. Henderson was convicted of first degree murder and sentenced to life imprisonment. The prosecutor was A. Lee Ervin, Commonwealth's Attorney for Augusta County. Ervin had prosecuted Strickler in 1990, and Strickler was convicted of capital murder and sentenced to death.

4. On February 7, 1991, I filed a Motion for Discovery and Inspection requesting in relevant part, "Any statements allegedly made by any person which show or tend to show any information within the knowledge of possession of the Commonwealth which tends to be exculpatory, mitigating, or otherwise favorable to the defendant," *id.* at ¶ B.1., as well as "Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information," *id.* at ¶ 10.

5. The Commonwealth filed an Objection To Defendant's Motion For Discovery And Inspection on March 5, 1991. In response to B.1, the Commonwealth agreed "to provide any exculpatory evidence that it may have knowledge of." As to 10, the Commonwealth agreed to provide "any exculpatory evidence that is within the knowledge of the Commonwealth's Attorney."

6. On March 20, 1991, the trial court entered an Order directing in relevant part that the Commonwealth's Attorney "provide all exculpatory evidence that he has knowledge of to [Henderson]."

7. Pursuant to that Order and the Commonwealth's consent, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County prior to Henderson's trial. I had access to these files on more than one occasion, and I was permitted to make copies of any materials.

8. I have reviewed the attached Exhibits 1-8 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

9. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I could not find copies of any of the material contained in Exhibits 1-8.

10. I have reviewed my cross-examination of Anne Stoltzfus during Henderson's trial. Exhibit 9. My cross-examination questions do not rely on any of the materials in these exhibits. I must presume that none of these materials were in the Commonwealth's files when I examined them.

11. To the best of my knowledge I first learned these materials existed when they were shown to me sometime in 1997.

12. The material in Exhibits 1-8 provides powerful impeachment material and should have been disclosed to me pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

13. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler and Henderson on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

14. I believe the notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in many significant respects. The materials also provided a basis to bar her testimony altogether since Stoltzfus stated that her "memories" were based on conversations with her daughter. Had I known of these materials, I would have made a motion *in limine* to prohibit Stoltzfus' testimony.

15. The documents satisfy the requirements of *Brady* and *Kyles* for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether undisclosure of the evidence "undermines confidence in the outcome of the trial." *Kyles*, at 1566, quoting *Bagley*, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to me as Henderson's trial counsel.

Further, affiant sayeth not.

/s/ Humes J. Franklin, Jr.
Humes J. Franklin, Jr.

Sworn to before me this
5th the day of September, 1997:

/s/ Eileen P. Illegible
My Commission expires on: 9/30/99

Exhibit Nine

VIRGINIA:
IN THE CIRCUIT COURT OF AUGUSTA COUNTY

HEARD IN:
THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA — 90-CR-470
VS. — 90-CR-471
RONALD LEE HENDERSON

WINCHESTER CIRCUIT
COURTROOM,
ROOM 3-D
WINCHESTER, VIRGINIA 22601
MARCH 26, 1991

The above-entitled matter came on to be heard for the purpose of second day of trial at 9:00 o'clock, a.m.

BEFORE:

THE HONORABLE RUDOLPH BUMGARNDER, III
PRESIDING

APPEARANCES:

FOR THE COMMONWEALTH: A. LEE ERVIN, ESQUIRE
COMMONWEALTH ATTORNEY
and
RICHARD E. MOORE, ESQUIRE
ASSISTANT COMMONWEALTH ATTORNEY
ONE LAWYERS ROW
STAUNTON, VIRGINIA 24401

FOR THE DEFENSE HUMES J. FRANKLIN, JR., ESQUIRE
JEFFREY A. WARD, ESQUIRE
129 NORTH WAYNE AVENUE
POST OFFICE DRAWER 1140
WAYNESBORO, VIRGINIA 22980

COURT REPORTER LANELL H. BERGER

* * *

[44] A Yes.

RECROSS-EXAMINATION

BY MR. FRANKLIN:

Q Let me see if I understand that, Mrs. Smith. Now, we are not talking about Mr. Strickler. We are talking about Mr. Henderson. And, when you observed him that afternoon his jeans were filthy dirty at that time?

A Yes.

MR. FRANKLIN: No other questions.

MR. ERVIN: No other questions.

THE COURT: You may step down.

MR. ERVIN: Your Honor, may this witness be excused?

THE COURT: Any objection?

MR. FRANKLIN: NO, sir, Your Honor.

THE COURT: You may be excused.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. ERVIN: Call Ann Stolzfus.

WHEREUPON,

ANN STOLZFUS

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT – EXAMINATION

[45] BY MR. ERVIN:

Q Ann, would you state your full name, please?

A Yes. My name is Ann Hess Stolzfus.

Q And, where do you live?

A I live in Harrisonburg, Virginia on weekends and Richmond, Virginia during the week.

Q And, what are you doing in Richmond?

A I am in pharmacy school.

Q Pharmacy school?

A Yes.

Q Ann, I direct your attention back to the afternoon of January 5th of 1990. Do you remember that day?

A Yes. I do.

Q Did you go any place in particular that afternoon?

A Yes. I went to the Mall to do some last-minute Christmas shopping, because my college-age daughter

was not coming home until Sunday. So, we were having our Christmas on January 7th.

Q Who all went with you to the Mall?

A My fourteen-year old daughter.

Q About what time did you go to the Mall?

A We headed out about a quarter after 4:00 and . . .

Q Just tell the jury where all you went, Ann, and what happened.

A Actually, I started at 4:00 o'clock. I went [46] to JMU, because I was then a full-time JMU student. I paid my tuition. I went across the street and picked up my daughter from the doctor's office. We ran over to the Mall. Went to Centerpointe Bookstore to look for a certain C.D. disc that my oldest daughter wanted for Christmas.

And, Centerpointe Bookstore didn't have it. So, we said that while we are here we will run across to K-Mart Pharmacy and pick up a prescription that I had gotten filled. And, so we were there from about 4:30 to 5:30. We bought a few things.

And, then my daughter got the idea that if we went back over to the Mall and checked the other music stores that maybe they would have the C.D. disc, even though it is a religious disc. And, so, we did that. We went back and parked outside Centerpointe and went in to check at Record Corner, and then on down to Musicland. Got down to Musicland probably about ten minutes to 6:00, p.m.

Q Did something happen inside that was unusual?

A Well, I asked the girl that waited on me if they had this disc, and she said that she didn't know that I would need to wait for a tall clerk named, Rob, to wait on me. And, so I was waiting patiently for Rob to get finished with some other customers. And, in walked a [47] blond girl and a mountain man. Now, the mountain man was vaguely familiar to him, because I had seen him two years before when I worked at Leggetts over Christmas break and I had waited on him. So, he was familiar to me. And, his "revved-up" character was familiar to me.

Q What did this so-called "mountain man" look like? How did you come up with a. . . . Is this the name that you gave him, "mountain man"?

A Well, to be truthful, it was the name that the clerks at Leggetts called him. They had had contact with him two years previously. They called him "mountain man" and they told me at that time that they thought he was from West Virginia. So, I just remember it as soon as I saw him. "Oh, that is mountain man."

Q What happened then?

A He came in and was "revved-up" in nature and impatient and asked the same girl . . . I don't remember what he was buying, but the girl told him the same thing. That he would have to wait for Rob.

Well, Rob finished with the other customer and came over to wait on him and the blonde girl stepped back and sort of got her hair . . . Her hair was all frazzled, because it was a very windy day. So, I instinctively stepped back just to get away from her, and because mountain man was kind of intimidating. And, I stepped back into [48] a

relatively tall dark-haired man. And, I stepped a little bit on his foot and bumped against a coat that he had draped over his arm.

Q What type of coat was this? Do you remember?

A My memory is not real clear. I will just say, I remember things in pictures. So, I sort of had a vague picture. But, I remember feeling it and it felt like a synthetic-type material. I think it was tan and I think it was kind of long. I do remember bumping into something hard. And, as soon as I bumped into him I said, "OH, I am sorry." And, looked up at him. And, I remember being struck by how familiar he looked, because he looked like some of my relatives with dark hair and large dark eyes.

Q Before you go on, let me show you Commonwealth's Exhibit Number Nine, a photograph of Thomas David Strickler and ask you if you recognize that man?

A Yes. I do. That is mountain man.

Q That is mountain man, here.

Did you give a nickname to the other man that was in there?

A Well, later when I was telling someone about it I called him, "Shy-guy", because he seemed shy. When I bumped into him he just kind of very slight, just had a very faint smile, and then kind of nervously fidgeting [49] with his coat pocket, I guess, to check whatever was there that I had knocked out.

And, then I just asked him briefly if he was waiting for Rob, too. He said, "No. I am with that other guy." Something to that effect.

Q So, what happened then?

A Well, Strickler purchased the few things that he was getting and as soon as Rob was . . . Rob was at the cash register just inside of the store entrance. And, as soon as Rob was finished, it was about 6:00 o'clock, he just walked out of the store. We were waiting. And, the girl said, "Well, he will be back in about a half an hour. He must have gone to lunch, or supper."

So, my daughter and I decided to put in time, because, you know, I really wanted to get this C.D. disc. So, we went on down to Watson's and shopped around for about a half an hour. And, actually, it was more like 45 minutes.

About a quarter of 7:00 we came headed back up towards Musicland, again. And, as we are coming down the center of the Mall I ran into these characters, again. And, first I saw mountain man just yelling, and he was yelling a name and it wasn't real distinct. And, I saw the blonde girl, and I thought he was probably calling her. So, I stopped and asked her if he was calling her.

[50] I know he was calling her a name that started with "D". I think it was "Dawn". It may have been "Della". I am not hundred per cent sure. But, I stopped and asked her if that was her. And, she said, "Well, my name is Della . . . Donna . . . whatever". And, also something else.

Q Where did you all go after that, then? What happend after that?

A I am trying to remember. I just have this picture of shy-guy standing down the hall. Of mountain man

saying to the blonde girl . . . and he was very revved up. I remember getting close to him just to see if I could smell alcohol on his breath. And, I did not smell alcohol on his breath. And, he said, you know, "I have got to get out of here. I have got to get out of here. Go. Go. Meet me at the bus stop."

And, the blonde girl, as she was . . . you know, she was sort of walking backwards while he was still talking to her, and he bumped into me . . . Excuse me, she bumped into me. And, then she asked me where the bus stop was, and I told her that it was up at the Mall entrance.

And, mountain man headed up the Mall that way and the blonde girl went up with shy-guy this way. They went out . . . I went on into Musicland with my daughter to check with another clerk to see whether they had that [51] C.D. disc and it turned out that they didn't. So, we went back out through Centerpointe to see if we could order it from Centerpointe, and then we couldn't because the manager wasn't there. So, we went out to our car and we were going to go home and just head out in that direction, but instead we decided to go around and check for something else at Leggetts, which is around the other way.

Q So, what happened then?

A So, I came out, you know, like here is J.C. Penny's I came out here at J.C. Penny's like the west side of Penny's and stopped at the stop sign. And, in came a shiney dark blue car. Now, this was, maybe ten minutes to seven, something like that. Shiney dark blue car with a

black girl in it, and she was singing and she appeared to be just very cheerful.

And, she pulled up in front of the Mall entrance and I turned right and pulled up behind her. It turns out she couldn't go. She had to stop. And, right there there are three lanes. There is a parking lane, and there is single lanes for the two directions of traffic. So, we were in the single lane.

On the right part in front of the main Mall entrance was a greyish, bluish van of some sort that was leaving off probably high school kinds. And, just to the side of that, right in front of this blue car was a white [52] pick-up truck with a man, a woman and a teenage boy. And, they had stopped to wait for traffic coming this way to turn left to go in and park.

They did go in. First the man pulled off, then the pickup truck. Then the pickup truck turned left and people went and parked. But, okay . . . I should back up and say, when I pulled up to the Mall entrance I noticed that shy-guy and the blonde girl were standing outside of the Mall against the wall just sort of leaning back, resting against the wall. Mountain man was nowhere to be seen.

Before the van pulled off, after the kids got off the van, about that time mountain man comes tearing out the door. Runs up to the, you know, exit door of the van, talks to the driver and then came running back. Looked like he was mad. Slammed his, you know, banged the back of the van. And, then, went away and sort of "zigged" around and ran up to the passenger door of the pickup truck and just briefly talked to them.

Now, it was very windy, so, you know, like flannel shirt and denim jacket were sort of flying open and his wild hair was flying out. And, like I say, he just talked briefly to the three people in the pickup truck and then immediately ran back to the blue car. And, the blue car had West Virginia tags. And, I though, [sic] "Oh, no. [53] Mountain man from West Virginia. West Virginia tags. This must be who he was looking for."

And, he banged on the window and there was no response. And, he, you know, jiggled the door real hard a couple of times. Nothing happened. The door didn't come open. And, the black girl inside looked kind of defensive. She kind of reached over quick as if to lock the door, I mean, sort of made that motion. And, then mountain man looked like he was really angry. And, again, jiggled the door really hard and the door came open. And, he jumped in and jumped right over against her like he was a close friend, and was talking a little bit. And, then very quickly moved back and opened the car door and motioned for the other two that were over against the wall.

They came running over. Blonde girl started . . . Now, this was a two-door car. So, he had to hold the, you know, the seat, whatever, the backrest of the seat so they could get in the back seat.

The blonde girl stepped in with her left foot in the car and all of a sudden, all of a suddent [sic] the driver, the black girl, stepped on the gas.

Okay. By this time the van and the pickup truck had gone. The pickup truck . . . the van was gone. The pickup truck had parked and the three people that were inside of

the pickup truck were walking into the Mall and [54] they were now in front of her car.

She stepped on the gas to go and rammed her car right up against the man. I have seen the man. I know exactly what he looks like. I am sure he would remember. He looked at her like she was, you know, strange, like he was wondering what was happening.

Q What was mountain man's response to this?

A Okay. As soon as Leanne, excuse me. Can I say that?

Q Well, before you go on: Did you see the black girl, the driver of the car?

A Yes. I did.

Q Let me show you Commonwealth's Exhibit Number One, the photograph of Leanne Whitlock. Do you recognize that?

A Yes. I do.

Q And where have you seen this girl before?

A I saw her in the car. She was the girl in the car.

Q This was the driver of the car?

A Yes. This was the driver. She was in the driver's seat the entire time that I saw her.

Q Also, Ann, let me show you Commonwealth's Exhibits Four and Five, photographs of a vehicle. I ask you if you recognize that vehicle?

[55] A Yes. I do. Except, when I saw it it wasn't muddy. It looked like it was brand new.

Q Okay. The license number on there; do you recognize that?

A Yes. I do. NKA-243 and later when we were going out I had my daughter write down the license plate number. And, I told her to remember, "No Kids Alone two forty-three".

Q So, this is the car and the driver that you identify as Leanne Whitlock?

A Yes. I do.

Q Going back, then, to when she stepped on the gas and the car jumped forward; what was mountain man's response to that?

A Mountain man's response was, to me, he started hitting her. He started hitting her in the shoulder. Started hitting her in the head.

Q What happened then?

A I am sorry. It is upsetting, because I witnessed violence and did nothing. Leanne was also, when she stepped on the gas she, also, was honking the horn. And, he kept hitting her and then was hitting her on the head. And she put both hands up to protect her head and that took her hands off the horn. So, she stopped honking the horn and then people sort of went their own way, like, "Well, it is okay."

[56] She stepped on the gas, also. The blonde girl who was half way in the car jumped back and I can remember her bounding on one foot to try to get her balance. She nearly fell.

Shy-guy was, at that point, behind the blonde girl not yet in the car. And, just took off like a frightened deer and ran back and stood against the wall. And, at that point . . . Okay.

At the point that Leanne put her hands up to protect her head and the horn stopped blowing mountain man waved for the two to get back in the car, and they did. They very calmly got in. The blonde girl got in first in the back seat. So, it would have been the left rear seat from where I was. I am still in the car just immediately behind them. You know, it is nearly 7:00 o'clock by now. It is dark, but it is lite up. I can see everything because it is lite up from all of the Mall lights.

So, the blonde girl got on the back seat on the left and shy-guy followed her and got in the back seat on the right. And, as he got in he handed his coat up over the seat to Strickler. And, Strickler bent over and fell on the floor . . . bent over really alot so I could barely see him. Fiddled with the coat for along time. And, while he was doing that shy-guy was sitting up and [57] blonde girl, were both sitting up on the edges of their seat kind of over just directly behind the driver. and, shy-guy had his hands up on her shoulder and arm and I mistakenly thought that was being friendly. The girl seemed kind of excited and kept bounding in her seat, like, you know. I misunderstood what was happening.

As soon as Strickler in the front seat sat up he moved, immediately, over to the middle of the seats and was facing Leanne. And, then the other two just sat back very quickly, totally relaxed and they just sat there and nothing happened.

So, I honked my horn. By that time there was no other traffic around, and it was getting late and I wanted to go. And, nothing happened. And, I said to my daughter, "Well, what is going on? What is wrong?"

So, pulled up parallel. They are here. I am here. I just pulled around them. Pulled parallel and I didn't leave enough space, only maybe eight inches between the two cars. And, I jumped out of the driver's side and my daughter was in the passenger side in the front. And, I have a little V.W. Rabbit that is pretty much the same size at that car.

I jumped around and ran around the back of my car and up to . . . I wanted to go up to talk to Leanne to say, "Are you okay?" I ran around and got to the back, [58] seat, and as soon as I did shy-guy just instinctively rolled over and hid his face down in the right-hand corner of the car and the girl started jabbing him.

And, I got up to the passenger to talk to Leanne. I knocked on the window, and she didn't look at me. And, I saw that Strickler was sitting . . . there were bucket seats and he was sitting in the middle facing her. He wasn't sitting on a seat. And, I got terrified. And, I quickly ran back. I mean, my heart just started pounding wildly. And, I got back and jumped into my car and told my daughter to duck. And, I pulled front maybe half a cars length and started trying to get Leanne's attention. I turned around like this. She would look at me. She was totally expressionless, totally frozen. and, she would look at me and I would mouth, "Are you okay?" And, she would do absolutely nothing. She made eye . . . I did that three times.

Each time she would look in my eyes totally expressionless. I am thinking like, "Go mind your own business, woman."

She would look at me and then she would look down without moving her head would look down to her right. And, I was kind of frustrated that I wasn't getting a response, so I started to pull in front a little more. And, so I thought, "No. I have got to ask one more time." So, I turned around one more time and said, "Are you okay?" [59] And, then I got a simple one word response. I did not understand what the response was, so I pulled on forward. And, what she had mouthed . . . she had just mouthed one word to me . . .

Q What did she mouth?

A She just mouthed "Help!" And, she did open her mouth quite wide to say it. At first I couldn't figure out what it was So, as I said, I pulled forward. I stopped at about Medco Drug, which is something like six to eight car lengths in front of where she was. I told my daughter "I think she said, 'Help'. Go in and get the security quickly." Well, my daughter didn't want to do that. She wanted to go home. She said, "Oh, they are okay, Mother. Don't worry so much."

I looked back and couldn't see what was happening, because at that distance there was too much darkness. And I said, "Okay. You stay here and I will run and get the security." And, I was just ready to open the door and at that time Leanne drove her car passed [sic] me.

There is a little turn. I am here in my car. She drives very, very slowly passed [sic]. Leggetts is right up here so

she makes a left to go passed [sic] Leggetts and then the street turns, the driveway turns to go passed [sic] the front of Leggetts and there is a fairly high . . . what do you call it, bump . . . the sidewalk is fairly high. [60] She had been going extremely slowly and I started to follow her. And, then it looked as if she stepped on the gas and went up over the curb. And, there was alot [sic] of carrying on.

Again, it was dark enough that I couldn't see real distinctly, but there were arms waving and flying. And, it wasn't clear to me at that point who was the drunk driver.

We followed them out to the end of the road, the street where we had to stop for the Mall driveway that comes around this way. And, on our way out there I had a little 3 x 5 card in the car. And, as I said, I told my daughter quickly to write down the license plate number NKA-243, West Virginia. She wrote on the card.

I thought, "Oh, I will just follow them." And, they turned left. And, I am sitting there noticing that my gas tank gauge was empty and I had no cash with me. And, I am thinking, "Well, I have enough gas to make it back into town." It looked as if they were going to go back into Harrisonburg.

Instead Leanne, all of a sudden switched lanes to turn right to head out 33 West . . . excuse me. 33 East toward Elkton. And, that is not an area that I am familiar with. So, I made a decision to go around to the other side of the Mall and try and call the police.

[61] So, I drove around in front of the Roth Theater and stopped in front of where they have their pay phones. And, at that point I was trying to tell myself that I shouldn't be worried. Nothing is wrong. And, I didn't know what to tell the police. So, I didn't go in. And, I drove on home.

Q The last time you saw this vehicle and all of these people was when it was going on 33 East?

A Right.

Q Ann, let me show you Commonwealth Exhibit Number Six, a photograph of the Mall; do you recognize that?

A Yes. I do.

Q And, this is 33 out here?

A Right.

MR. ERVIN: Judge, could the witness approach the jury?

THE COURT: Yes.

BY MR. ERVIN:

Q Using this photograph, where did all of this occur?

A Right here.

Q This is the entrance to the Mall?

A Right. I had parked over here and drove around here and stopped. Saw Leanne coming in here and she pulled up exactly in front of the main doors. Then when I

pulled * * * [62] Now, I couldn't tell how tightly he would have been touching her.

Q This dark-haired man; at the time was his hair long or short?

A It was fairly short.

Q Did he have a beard or facial hair?

A I am not sure. But, I don't always remember whether my husband has a beard. I think that he has just sort of a frizzly little beard.

Q And, the man that you described as "shy-guy"; is he here in the courtroom?

A I haven't looked around. Yes. Yes. He is.

Q And, where is "shy-guy" sitting?

A That is him right there.

Q This man, here?

A Yes.

MR. ERVIN: Judge, I would ask that the Record show that the witness identified the Defendant.

THE COURT: So ordered.

BY MR. ERVIN:

Q This is the man that you saw get into the car?

A Yes. It is. His hair was longer then.

Q It was longer?

A Yes. Longer than it is now.

Q And, this is the man you say took his hands and [63] put them on Leanne Whitlock after he got in the car?

A Yes.

Q Ann, this is Mr. Franklin and Mr. Ward. They may have some questions for you.

CROSS - EXAMINATION

BY MR. FRANKLIN:

Q Is this the mountain man?

A Yes. It is.

Q The man you described as being "revved-up"?

A Yes.

Q What do you mean when you say that he was "revved-up"?

A He was agitated.

Q Mad?

A I would say that he was angry at the point when he hit the van. But, otherwise, no. He was just agitated.

Q Aggressive?

A Yes.

Q Extremely aggressive?

A Yes.

Q Aggressive to the point that you described him as being "revved-up"?

A Aggressive to the point that I became fearful.

Q As a matter of fact, in some of your prior testimony, after you saw these two men in the record shop [64] you described part of it today. You heard Strickler hollering at this girl out in the Mall.

A Uh, huh.

Q And, in that testimony you said that you became frightened, yourself; is that correct? Is that a fair statement?

A Yes.

Q Frightened of Mister . . .

A I was concerned at that point.

Q Frightened of Mr. Strickler?

A Yes.

Q When you say he was hollering; how loud was he hollering?

A Very loudly.

Q Very loud?

A Uh, huh.

Q Still "revved-up"?

A Yes.

Q Had this revved-up, agitated appearance increased, stayed the same?

A I would say that it was fairly constant. And, the two years earlier when I saw him at Leggetts in the boy's

department when he came to try to return a dress with another blonde girl, he then, also, was agitated. So, it may have been a personality trait.

[65] Q You described your first confrontation with these two men in the record shop. And, you say that you backed up into Mr. Henderson, shy-guy?

A Yes.

Q And, he sort of looked at you and smiled?

A Very faintly. It was a bit cold.

Q Now, he did not exhibit, nor have you testified that he exhibited any of these revved-up characteristics at all?

A No. That is right.

Q Subdued in comparison to Strickler?

A Yes.

Q I want to make that comparison. Is that correct?

A Yes.

Q During the course of time that you were in the Mall did you see Mr. Henderson, shy-guy, talking to a girl who had a baby in a stroller?

A No. I didn't notice that.

Q You didn't notice that?

A No.

Q There was a period of time when you lost sight of them; is that correct?

A Yes. I saw them at about 6:00 o'clock and then I ran into them, again, in the center of the Mall about 6:45.

[66] Q If I understand you, when you first bumped into Mr. Henderson he was holding his coat and it was a long tan coat, or tan in color; is that the way you described it?

A I have a very vague memory of that. It was tannish, or just a very tannish-greenish kind of thing.

Q It was long? Appeared to be long? I think that is what your . . .

A Yes. That is my memory, because later in the center of the Mall he had it on.

Q When he had it on would it have come long enough . . .

A My memory is that it came down nearly to his knees.

Q Almost to his knees?

A I can't be one hundred per cent sure of that. I know that he was neatly dressed. And, I remember smelling a faintly sweet deodorant-type smell, which was very different.

Q Oh shy-guy?

A Yes.

Q You described him as "neatly dressed". How would you have compared his dress to Mr. Strickler's dress?

A Well, Strickler had a stench and clearly wasn't as neatly dressed.

Q You described Stricker as "beating on the van", [67] or the back of the truck with his fists?

A The back of the van. Not the pick-up truck.

Q It wasn't an "oh, shucks" type of thing? It was an aggressive strike; was it not?

A Yes.

Q Did it appear that even from the revved-up condition that you saw him in in the Mall, did it appear that he had become even more agitated, or even more aggressive?

A I couldn't say that for sure. Certainly, the behavior that I observed was more violent outside than inside the Mall.

Q Than inside the Mall. But, it was even bad enough in the Mall that I think you previously testified that it stopped you in your tracks?

A Stopped me in my tracks. I came up very close to him, which is how I got the stench vividly in my memory. The reason I did that was because I thought maybe I could smell alcohol on his breath, and it occurred to me that maybe he was on cocaine. But, that is the type of behavior he had. I think that his behavior in the Mall was fairly consistent with his behavior in the Mall the other time I observed him two years earlier.

Q Okay. Then, we have him beating on the back of this van. You described him as "jiggling". Before, I think, in your sworn testimony you described him as yanking [68] on the door of this blue car to get it opened; is that correct?

A Yes.

Q Well, he was kind of yanking on it with both hands.

Q Pulling on it like that?

A Right.

Q Before, in your testimony, you described the blue car as shaking he was pulling on it so violently?

A Right.

Q It was actually rocking?

A Yes.

Q He had come from nowhere to do that? He had not been standing there with shy-guy at the time; had he?

A No.

Q Shy-guy and the blonde girl were standing outside, and I believe your testimony is that he came tearing out of the Mall door straight out to the car?

A Strickler had given them orders to meet him at the Mall entrance. And, Stricker had said, "I need to get out of here."

Q You say Strickler gave them orders. There was no question about the fact that Strickler was in charge here?

A Clear. Strickler was the lead man. The girl [69] just watched him. And, shy-guy hung in . . . In the times that I observed him, kind of hung back.

Q Okay. And, Strickler was the one who was calling the shots, at least there in the Mall. No question about that?

A The times that I observed them. Yes.

Q Okay. He rips the door open and slides in over against Leanne Whitlock?

A Yes. Facing her.

Q And, then, does this motioning the blonde girl and shy-guy: Come out. And, then she gives it gas. They jumped back. And, as I think you described Henderson, he looked like a frightened deer and he ran back to the Mall; is that correct?

A Well, he ran back . . . Instead of against the wall where he had been initially.

Q So, it is at this point that Strickler starts striking Leanne?

A Right.

Q Repeatedly?

A Right. Yes.

Q About the face and about the head?

A Yes.

Q Mr. Henderson had no part of that? He wasn't even in the car?

[70] A No. He was standing and watching against the wall.

Q He then gets her to put her hands up like that. Motions to them and they get back in the car and then you described what happens afterwards.

A Yes.

Q In the course of all of your observations did you come face-to-face with Mr. Strickler so that you could describe to the jury his eyes?

A (No response.)

Q Would it be fair to say that they were "wild" in appearance?

A Those wouldn't be my words. They were not even terribly blood-shot, but appeared to slightly blood-shot as if he hadn't slept for a while.

Q Okay. After this whole ordeal that you have described here was over, Mrs. Stolzfus, you never did report it to the police; did you?

A No, because at the point that I made the decision not to call the police that I had convinced myself that what I saw was just a normal occurrence.

Q At that time you were living in the Harrisonburg area; were you not?

A Yes.

Q You heard reports that there was a JMU Student [71] missing; did you not?

A Well, to be truthful, my daughter just came back from France. We went to the airport to pick her up. Have her Christmas, and I was pretty much isolated from the world. Went to JMU Monday to get my schedule and classes lined up and classes started Tuesday. I learned of it by word-of-mouth. My memory, then, was that it was about Thursday of that week that I went back out to the Mall shopping and learned it from a clerk at the Mall.

Q But, even, then you didn't report it to the police; did you?

A I had nothing, sir, to report to the police, because I made no association at the time. I heard at the Mall that a black girl had been abducted from the Mall, from inside the Mall, sometime that Friday Evening. I remember going carefully going in my memory over everywhere I had been inside of the Mall and I had not remembered seeing a single, solitary black girl from inside of the Mall. And, so, I dismissed it from my mind at that point.

Q Mrs. Stolzfus, after describing to this jury, having to stop in your description of what you saw, you tell this jury . . . under oath . . . that you did not make that association?

A Absolutely. It is very easy to understand, I think. I didn't have access at that point. I had [72] not seen this on t.v. I had not read the newspaper, as I typically do. I was extremely busy that week. I am the mother of four children. I was a full-time student. We just had a family Christmas. I wasn't worried about local news.

Q Mrs. Stolzfus, immediately after you described what you saw in the Mall to some students at JMU they put the Harrisonburg Police in touch with you; didn't they? And, the Harrisonburg Police came to interview you; did they not?

A Okay. It is not quite that simple, sir. Tuesday of the following week . . . Now, I went a whole week and made no association, whatsoever. That Friday I learned that the car had been found. Around Saturday of that week, in other words, eight days after I had been at the

Mall I learned that Leanne's body had been found. I learned that, again, from someone at the Mall. I had gone to the Mall Friday Night. Discussed it with a clerk there. At that point I made absolutely no association.

Tuesday in a class I was talking with a group of black students who happened to be in that class, who happened to have been friends of Leanne's and everyone was tearful and upset. And, I learned a lot of details. I learned a lot of details about what happened. And, on some level . . . I will say . . . on some level I was starting [73] to become uneasy.

The following day . . .

Q What details did you learn that you didn't already have, Mrs. Stolzfus?

A Well, one detail was that she was abducted in a car. And, as soon as I learned that it wasn't a girl taken from inside of the Mall . . .

Q Let me just interrupt you there. Who told you that she was abducted in a car? You are the one who provided that information, Mrs. Stolzfus. Who told you that she was abducted in a car?

A Okay. The girls in my class. That was a conclusion that the kids at JMU had made, because she had been seen before she left for the Mall and that is the last that she had been seen. And, because the car had been found then they knew that she had been taken in her boyfriend's car. So, that was a conclusion that people made. That was speculation . . . purely speculation that maybe she hadn't made it inside of the Mall afterall.

Q But, that was one that you couldn't have made earlier?

A No, sir. Not from the information, or the lack of information that I had. I will say the first time . . . If you want to understand the psychology of how my mind worked in this . . . and obviously, on some level I was upset. [74] Monday Morning . . .

Q Mrs. Stolzfus, I want to ask you the psychology of how this was such a traumatic experience that you drove around to use the phone to call the police and yet when you learned of all of this you didn't make the association for ten days later? I want to understand that psychology.

A That is not too hard to understand, if you understand that women have feelings and often their husbands tell them that they should use their rational facilities. My feelings told me one thing, and my mind told me something else. I listened to my mind.

As I drove away from the Mall that night after I had decided not to call the police, after my mind told me that I was crazy and imagining things, et cetera, et cetera, I broke down and cried on the way home. I said to myself, "I don't understand why I am so upset. I don't understand why I was so afraid."

Okay. And, you must understand that on some level I did not ever want to believe that that was what I saw.

Monday, a week after, January 15th, something like that, I went out to my car. Cleaned out my car. And, as hard as this may be for you to believe, I came across this little piece of trash. The 3 X 5 index card that said, "West

Virginia, NKA-243" and I go, "what is [75] this?" I could not remember what in the world that was for. It was written in pencil in my daughter's handwriting. I figured that it was a piece of scrap paper. I threw it away. I had a large trash bag. I threw it in the bottom of the trash bag. And, as I threw it in through my mind went the thought, the police won't find it there. I go, "Oh, my God! I am getting paranoid." Then I dismissed the thought. So, on some level I was emotionally blocking it.

The very next day I went to class. Learned more details about the case. The following day I went to the same class. Talked to Kim Davis and asked her, "What did the car look like? Was it dark blue?"

Before I did that. That was Wednesday. Wednesday Morning I came back between . . .

Q Thank you. Thank you, Mrs. Stolzfus.

MR. FRANKLIN: Judge, I have no further questions.

THE COURT: Redirect?

MR. ERVIN: No, sir. No further questions at this time.

* * *

September 17, 1997, Attachments to Petitioner's Supplemental Memorandum in Further Support of Motion For Summary Judgment

Case No. 3:95-CV-924

United States District Court

Eastern District of Virginia

9-08-97

Response to Interrogatories from Capt. D. L. Claytor

(Q)1. State whether the handwritten notes of the January 19, 1990, interview of Anne Stoltzfus (Exhibit #1) were written by then Det. Claytor. If not, state who prepared the notes. State to whom the document was distributed an [sic] when.

(A)1. Notes were written by D. L. Claytor, Document distributed to Virginia Capital Representation Center, Counsel for Tommy David Strickler, under Subpoena of the U.S. District Court.

(Q)2. Det. D. L. Claytor prepared typed reports of his interviews with Anne Stoltzfus on January 19, 22, 24, 25 and February 1, 1990. See Exhibit 2 (6 pages) State to whom Det Claytor distributed this report and when.

(A)2. Report distributed to the Commonwealth Attorney of Rockingham County, Date Unknown, and the Capital Representation Resource Center.

(Q)3. Exhibit 3 (two pages) is entitled "observations" and is dated 1-19-90 1:00 PM in the upper left hand corner. State:

a) who prepared this document

b) state when it was received by Det. Claytor

c) state to who Det Claytor distributed this document and when

(A)3.a) Document was given to Det. Claytor by Anne Stoltzfus

b) Received by Det. Claytor 1-19-90 1:00 PM

c) Do not recall except for Capital Representation Resource Center

(Q)4. Exhibit 4 (3 pages) is typed letter dated January 22, 1990, to Sergeant Claytor signed by Anne Stoltzfus. State to whom Det Claytor distributed this document and when.

(A)4. Do not recall except for Capital Representation Resource Center

(Q)5. Exhibit 5 (1 page) is a typed document entitled "Notes for Det. Claytor: My Impressions of The Car (Anne Stoltzfus) State:

a) when Det Claytor received this document, and

b) to whom Det Claytor distributed this document and when.

(A)5.a) Do not recall

(A)5.b) Do not recall except for Capital Representation Resource Center

(Q)6. Exhibit 6 (1 page) is a handwritten note dated 1-25-90 1:45 AM to Det Claytor and signed Anne Stoltzfus. State to whom Det Claytor distributed this document and when.

(A)6. Do not recall except for Capital Representation Resource Center

(Q)7. Exhibit 7 (2 pages) is a typed letter dated January 26, 1990, to "Dear Detective Claytor" and signed Anne Stoltzfus. State to whom Det. Claytor distributed this document and when.

(A)7. Do not recall except for Capital Representation Resource Center.

(Q)8. Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus, entitled "Details of encounter with Mountain Man. Shy Guy & Blonde Girl." State:

a) when this document was received, and

b) to whom Det. Claytor distributed this document and when

(A)8.a) Do not recall

b) Do not recall except for Capital Representation Resource Center

(Q)9. State how Det. Claytor first learned that Anne Stoltzfus had information concerning the Whitlock Case.

(A)9. Do not recall

(Q)10. State whether notes or interview reports were prepared concerning the source identified in 9 above.

(A)10. Interview report of Anne Stoltzfus

(Q)11. State whether Det Claytor spoke to or interviewed the source identified in 9 abov(

(A)11. Interviewed Anne Stoltzfus

Respectfully submitted.

/s/ D. L. Claytor
Captain D. L. Claytor

COMMONWEALTH/STATE OF VIRGINIA

ACKNOWLEDGED AND SWORN TO BEFORE ME THIS 8th DAY OF September 1997.

/s/ Sarah L. Fairweather
NOTARY PUBLIC

MY COMMISSION EXPIRES: 3-31-99

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER
Petitioner.

Civil Action No.
3:95CV924

v.

J. D. NETHERLAND, WARDEN,

Respondent.

A. LEE ERVIN, UNDER OATH SAYS:

1. State whether you reviewed the handwritten notes of the January 19, 1990, interview of Anne Stoltzfus, see Exhibit 1, prior to or during Strickler's capital trial. State when you first reviewed these notes.

ANSWER: I do not remember seeing the handwritten notes, Exhibit 1, prior to or during Strickler's trial.

2. Det. D. L. Claytor prepared typed reports of his interviews with Anne Stoltzfus on January 19, 22, 24, 25, and February 1, 1990. See Exhibit 2 (6 pages). State whether you reviewed these reports prior to or during Strickler's capital trial. State when you first reviewed these reports.

ANSWER: Yes. These reports, Exhibit 2, were reviewed by me prior to Strickler's capital trial, but I do not remember the exact date I first reviewed them.

3. Exhibit 3 (two pages) is entitled "Observations" and is dated "1-19-90 1:00 p.m." in the upper left hand corner. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 3, dated 1-19-90, prior to or during Strickler's trial.

4. Exhibit 4 (3 pages) is a typed letter dated January 22, 1990, to "Sargeant Claytor" signed by Anne Stoltzfus. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 4, dated January 22, 1990, prior to or during Strickler's trial.

5. Exhibit 5 (1 page) is a typed document entitled "Notes for Detective Claytor: My Impressions of 'The Car' (Anne Stoltzfus)." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 5 prior to or during Strickler's trial.

6. Exhibit 6 (1 page) is a handwritten note dated "1-25-90 1:45 a.m." to "Detective Claytor" and signed "Anne Stoltzfus." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 6 prior to or during Strickler's trial.

7. Exhibit 7 (2 pages) is a typed letter dated January 26, 1990, to "Dear Detective Claytor" and signed by Anne Stoltzfus. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: Yes. This letter was reviewed by me prior to Strickler's capital trial, but I do not remember the exact date I first reviewed it.

8. Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus, entitled "Details of Encounter with Mountain Main, [sic] Shy Guy & Blonde Girl." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: Yes. I did review Exhibit 8 prior to Strickler's capital trial, but I do not remember the exact date I first reviewed it.

9. State who first informed investigators that Anne Stoltzfus had information concerning the Whitlock case.

ANSWER: I do not personally know who first informed investigators that Anne Stoltzfus had information concerning the Whitlock case.

10. State whether notes or interview reports were prepared concerning the source identified in 9 above. Who is the current custodian of those notes or reports?

ANSWER: I do not know.

11. State whether you spoke to or interviewed the source identified in 9 above and the date.

ANSWER: To the best of my knowledge, I did not speak to or interview the source identified in 9 above.

12. State what materials, if any, were disclosed by you to Strickler's defense counsel pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

ANSWER: I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness statements in the file. I was in possession of Exhibits #2, #7, and #8 prior to Strickler's trial and they were part of my prosecution file which was made available to defense counsel for his inspection.

/s/ A. Lee Ervin
A. Lee Ervin

Subscribed to and sworn before me, a Notary Public, this 9th day of September, 1997.

/s/ Patty B. Campbell
Notary Public

My commission expires: August 31, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER Petitioner.	Civil Action No. 3:95CV924

v.

J. D. NETHERLAND, WARDEN,
Respondent.

STATE OF VIRGINIA
CITY OF STAUNTON

AFFIDAVIT OF THOMAS S. ASHBY

Thomas S. Ashby, having been duly sworn, states that:

1. During 1990 I was an employee of the Office of the Public Defender for the City of Staunton and Augusta County. I held the position of investigator. In that capacity I assisted William Bobbitt, Jr., the Public Defender, in his representation of Tommy David Strickler who was

charged with capital murder and related offenses arising from the murder of Leeann [sic] Whitlock.

2. In May, 1990, the Commonwealth filed a list of its witnesses with the Clerk of the Augusta County Circuit Court and requested that the witnesses be summoned for Strickler's trial.

3. To the best of my memory, sometime prior to Strickler's trial on June 18, 1990, I contacted Anne Stoltzfus, a Commonwealth's witness, by telephone. I told Stoltzfus that I wanted to speak with her about the Whitlock murder. Stoltzfus asked me who I was working for, and when I informed her that I was in investigator for the defense, she refused to speak with me.

/s/ Thomas S. Ashby
Thomas S. Ashby

Sworn to before me this 11th day
of September, 1997.

/s/ Linda H. Major
Linda H. Major, Notary Public

My commission expires: July 31, 2001.

September 25, 1997, Attachments to Warden's Supplemental Memorandum In Support of Cross-Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

AFFIDAVIT

Thomas E. Roberts, first being duly sworn, says:

In 1990, I assisted William E. Bobbitt, Jr., in the trial of Thomas David Strickler. I have reviewed the attached documents and although I cannot recall if I have seen these specific documents, I do remember the information contained in them. I remember discussing with Mr. Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time. It seemed too good to be true. The attached newspaper article is somewhat familiar. To the best of my recollection, we were concerned that Strickler had talked to a reporter without our knowledge or permission. It appears obvious that the witness quoted in the article is Ms. Stoltzfus.

I would be willing to testify to the above at the hearing scheduled for October 1 & 2, 1997 in the U.S. District Court at Richmond, Va. However, I am planning to be in Florida on a long-scheduled trip with my wife during that time.

/s/ Thomas E. Roberts
Thomas E. Roberts

City of Staunton
Commonwealth of Virginia

Subscribed and sworn to before me on September 25, 1997,

/s/ Illegible.
Norary [sic] Public

My commission expires
May 31, 1999.

[SEAL]

ROANOKE TIMES & WORLD-NEWS

DATE: Sunday, June 17, 1990
SECTION: NATL/INTL
SOURCE: MARK MORRISON
STAFF WRITER

TAG: 9006170257
PAGE: A1 EDITION: METRO

SLAIN STUDENT'S ABDUCTION DESCRIBED
'I FIGURED IT MUST BE A DOMESTIC DISPUTE'

Leann Whitlock was smiling and singing out load to herself as she drove into the parking lot of a Harrisonburg mall the night she was killed, a witness to her kidnapping says.

The look on Whitlock's face changed to one of terror moments later, the witness says, after a man forced his way into the car, punched her several times and let two other people pile into the back seat.

Whitlock, a James Madison University sophomore from Roanoke, was taken from the mall to a wooded area

about 30 miles away. There, she was robbed, stripped and beaten on the head with a rock.

Whitlock's body was buried in the woods under branches and debris, where it remained undetected in the January cold for more than a week.

By the time her body was discovered, Tommy David Strickler was already in custody as a suspect in her disappearance, and authorities were looking for a second suspect, Ronald Lee Henderson.

Strickler, 24, of New Market, goes on trial Monday in Staunton on a capital murder charge. If convicted, he could be executed. Henderson, also charged with capital murder, remains at large.

A third person, Donna Kay Maddox Tudor, faces grand larceny charges in the theft of the car, which belonged to Whitlock's boyfriend. She is free on bond and is expected to testify in Strickler's trial.

Tudor was with both men at Harrisonburg's Valley Mall the night Whitlock was kidnapped, according to the witness who saw the abduction. The witness asked not to be identified before the trial.

Her testimony is expected to be a key part of the prosecution's case. Commonwealth's Attorney A. Lee Ervin summoned more than 30 witnesses for the trial, which may last a week.

The witness, who was shopping with her 14-year-old daughter, said she encountered Strickler, Henderson and Tudor in the mall about 6:45 p.m. on Jan. 5.

Because she didn't know their names when she told police what happened, she said she referred to the three as "Mountain Man," "Shy Guy" and "Blondie." She later identified Strickler, Henderson and Tudor from police mug shots, she said.

The woman said Strickler was shouting, "Donna! Donna!" at Tudor, who was walking ahead of him with Henderson.

Tudor finally stopped and the woman said she overheard Strickler say, "I've got to get out of here." He told them to go outside and wait for him at the bus stop.

The woman and her daughter were in their car about to leave the mall a little later when Whitlock drove past. She said Whitlock was singing loudly and smiling.

The woman pulled out behind Whitlock, who was following a pickup truck. Near a mall entrance, the truck stopped, forcing Whitlock and the woman to stop.

A man rushed up to Whitlock's car from the mall and started pounding on the passenger-side window and pulling at the door handle, the woman said.

She said she saw Whitlock lean over as if she was trying to lock or unlock the door, but the door popped open and the man climbed in. He sat between the two front seats, right next to Whitlock.

The man punched Whitlock several times in the head, then motioned to another man and a woman standing nearby, the witness said.

"I figured it must be a domestic dispute," she said.

When the pickup ahead of Whitlock moved Whitlock, blowing the car horn, stepped on the gas. But she was forced to stop again for pedestrians who were walking across her path.

"At least a dozen people stopped and looked," the witness said. "Nobody did anything. I think everybody though it was just a bunch of college kids carrying on."

It seemed odd, she said. "Mountain Man didn't look like he would go with her, but the license plates were from West Virginia and he looked like he might be from West Virginia."

Whitlock was stopped long enough the second time for the man and woman to get in the car.

Meanwhile, the witness pulled up beside the car.

"I was trying to get her attention," she said. "She just sat there frozen, like she was a mannequin. I couldn't get her to look at me."

She moved forward a few more feet to be in better line with Whitlock's field of vision and said they made eye contact.

"I mouthed to her three times, 'Are you OK?' " the woman said.

Whitlock did not respond. "She was just so totally frozen in her appearance. But she met my eyes and then looked down to her right side.

"I was frustrated because I thought she was ignoring me," she said. "I didn't have a clear idea if she was OK or not. I couldn't figure out what was going on.

"When someone isn't responsive and ignores you, I think sometimes they're telling you to bug off. I wonder now what she was trying to communicate to me by looking down with her eyes."

The woman said she was about to drive off but asked one more time if Whitlock was all right.

"She mouthed back one word and she was totally expressionless," the woman said, but she couldn't make out immediately what the response was. The woman then drove past Whitlock about 15 yards and stopped again.

"I told my daughter she said, 'Help.' She mouthed help."

Just then, the woman said, Whitlock and her three passengers drove by picking up speed, hopping a curb with one tire.

The woman decided to follow the car. Whitlock turned onto U.S. 33 east toward Elkton. The woman said she was not sure how far she should follow. It was dark, her car was nearly out of gas, and Elkton was unfamiliar territory. And, she had a husband and three more children at home waiting on dinner.

She went home, but didn't call the police.

"What was I going to tell them? I had a lot of bad vibes, but I didn't have anything concrete," she said. "My thinking was, maybe they're just a bunch of college kids out drinking.

"Now, of course, I feel terrible that I didn't do anything, but you see a lot of crazy things."

The witness didn't come forward until 12 days later, when she told her story to Kim Davis, a friend of Whitlock's at JMU.

"Everybody on campus was talking about Leann, but I still didn't think anything about it," the woman, who attended JMU last semester, said. "I just couldn't make myself believe that what I saw had anything to do with her death."

Davis called the Harrisonburg Police Department, and the next day, Investigator D.L. Claytor questioned the woman about the kidnapping and showed her photographs of suspects.

"Mountain Man, I identified him right away," the woman said. "I could pick him out of a million."

Later, she called John Dean, Whitlock's boyfriend and the owner of the car Whitlock drove, and asked if he would meet her and show her photographs of Whitlock. She said she wanted to verify for herself that it was Whitlock she had seen.

"I feel really bad that I didn't call the police. I mean, it might have saved her life, I can't apologize to her family and friends enough."

About 45 minutes after Whitlock was kidnapped, another witness said he saw Strickler, driving Dean's car, turn onto the dirt road in Augusta County near where Whitlock's body was found.

Kurt Massie of McKinley said Strickler was in the car with either two or three other people. It looked like a blonde woman was in the passenger seat and a man was sitting in the back, he said.

He thought he saw a fourth person hunched down in the back seat, but he said he wasn't sure.

Massie said he got a good look at only Strickler, taking notice of him because he l[illegible]oked somewhat like Massie's brother and because his abrupt turn onto the road almost caused a wreck.

"There was no doubt about it," Massie said. "It was him. He turned and looked right at me."

He said he later identified Strickler in a police lineup at the Augusta County Jail, where Strickler is being held.

Strickler, Henderson and Tudor were next seen about 9 that night at Dice's Inn, a Staunton nightclub, according to other witnesses.

Nancy Simmons had gone there that Friday night with two friends and met "Stoney," as she said Strickler called himself, and Henderson shortly before the band came on. She said Tudor had arrived at the bar earlier.

"I hate to say it, but they acted like gentlemen. At the end of the night, Ron even kissed my hand. I couldn't believe that," she said.

Simmons and her friends danced with them, and she said at one point someone urged Strickler to "Get down." He responded by dropping to the floor and doing push-ups.

Simmons said she talked more with Henderson, who told her he used to ride with the Pagan motorcycle gang. He also had a prominent scar on his arm that he said was from a gunshot wound received in a family feud.

Back on the dance floor, he gave her a woman's silver Timex watch that he said was his ex-wife's. She said Henderson told her he also had a ring and something else to give away.

"He wanted to get rid of them because it was like getting rid of the memories," she said.

Simmons put the watch in her pocket at first, but later tried it on. That's when Henderson kissed her hand and told her the watch was a perfect fit, she said.

"It felt strange. I don't know why someone would give me a watch."

Investigators have confiscated the watch; they would not confirm whether it belonged to Whitlock.

Harry Dice, the owner of Dice's Inn, remembered Strickler being at the club that night because Strickler asked to use a kitchen knife to fix a broken necklace.

Simmons said Strickler, Henderson and Tudor left the bar together about 2 a.m.

The following day, they were seen driving Dean's car in the New Market area, according to New Market Police Chief Houston Toman. Police say Henderson also visited Strickler's home east of New Market, where Strickler had been living on and off with his mother and stepfather.

There, Henderson told the parents that he was looking for Strickler because their son had stolen a car belonging to his cousin, said Irene Silvious, Strickler's mother.

She said Henderson changed into a pair of her son's blue jeans, which had been stashed in a junked car on the

property. They argued and he fled, Silvious said, leaving his old clothes behind. The clothes also have been confiscated by investigators.

Strickler and Tudor, meanwhile, had taken Dean's car to Virginia Beach.

In an interview form jail, Strickler acknowledged he and Tudor went to the beach in Dean's car. He denied any involvement in Whitlock's kidnapping or murder, however.

Strickler contends prosecutors are trying to convict him to save face for not catching Henderson.

"All the commonwealth is looking at is that the girl's dead," he said. "They've got me and due to the fact that I was seen in the car, they think I'm the one. I was in the car – I can't deny that – but I wasn't in the car with the girl."

His version of the story is that he was hitchhiking north along U.S. 11 between Harrisonburg and New Market when Henderson picked him up in Dean's car on Jan. 5. They knew each other from parties, but were not good friends, he said.

That night the two of them met Tudor at Dice's Inn in Staunton. Strickler said he had not known her before.

Strickler and Tudor drove to Virginia Beach the next day, after Henderson let them borrow the car. But Henderson told them that he had to return the car to West Virginia the following Friday, Strickler said.

Three days later, Strickler said, he found identification belonging to Whitlock in the car's glove compartment. He said that made him suspicious.

Several months after Whitlock was killed, her parents, Ed and Esther Whitlock, received a credit-card bill in Leann's name. The charges came from Virginia Beach.

A ninth-grade dropout who has worked odd jobs since leaving school, Strickler has been described by police as a drifter, a label he contends isn't fair.

"I don't know why they call me that. I guess because I don't stay in one place," he said. "But a drifter to me is somebody who has nothing. I always knew someone, always had a place to stay.

"I've gone out of my way a million times to help people," he said. "At Christmas time, if I see a bum on the street, I've given them money or food. . . . I'll give them my coat. I'd give them the clothes off my back."

Despite undergoing two psychological examinations recently to determine if he suffers from brain damage, Strickler maintained he will not use insanity as a defense.

He plans to plead not guilty, and promised no plea agreements.

Strickler said he opposes the death penalty, and will appeal if convicted.

"Nobody has the right to kill another person. The only person who can make that decision is God," he said. "I'm not in favor of nobody taking nobody's life."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner, v. J.D. NETHERLAND, WARDEN, Respondent.	)	Civil Action No. 3:95CV924

FINAL ORDER

(Filed Oct. 15, 1997)

For the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that Petitioner's Motion For Summary Judgment On Claim J (*Brady* violation) And Claim U (denial of fair trial) is GRANTED, thereby nullifying Petitioner's convictions of September 19, 1990 and the sentences imposed thereon. Respondent's Motion for Summary Judgment is DENIED.

Let the Clerk send copies of this Order and accompanying Memorandum to all counsel of record.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

OCT. 15, 1997
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,	)	
	)	
Petitioner,	)	**Civil Action**
	)	**No. 3:95CV924**
v.	)	
	)	
J.D. NETHERLAND, WARDEN,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION
(Filed Oct. 15, 1997)

The crime giving rise to the instant proceedings occurred on January 5, 1990. The evidence at trial, in a brief summary, was as follows:

> The victim, Leanne Whitlock, a young woman, while driving a friend's automobile, had driven to a shopping mall in Harrisonburg, Virginia at approximately 6:45 p.m. While the vehicle was stopped, a man ran from the shopping section of the mall and forced his way into the vehicle which the victim was operating. She drove off an [sic] sounded blasts of the horn while the intruder struck her repeatedly. She stopped the vehicle, and a second man, accompanied by a blond-haired woman, allegedly entered the car. Ms. Whitlock drove the car away, and her nude body was discovered five or six days later.

The issue before the Court deals primarily with the predicate acts leading to the death sentence rendered against the Petitioner.

By agreement of Counsel for the Petitioner and Counsel for the Respondent, the issue of ineffective counsel, as contended in Claim B of the Amended Petition, has been withdrawn, leaving for the Court's determination, on the agreed pleadings, the claims in Claims J and U described in the following paragraphs.

On September 19, 1990, the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254, Strickler filed a Petition and an Amended Petition seeking a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. The matter comes before the Court on the cross-motions of Petitioner and Respondent for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motions have been fully briefed by the parties and are ripe for decision.

BACKGROUND

Charges against Strickler were first brought in Rockingham County in January 1990, and the case was later transferred to Augusta County when a capital indictment was returned in April, 1990. Strickler was tried by a jury before the Circuit Court of Augusta County (J. Wood) and found guilty of capital murder, robbery, and abduction. On June 21, 1990, the jury recommended two life terms on the robbery and abduction charges and death for the capital murder charge. On September 19, 1990, the judge followed the recommendation of the jury sentence in the sentencing hearing.

By Orders dated December 10, 1996 and January 16, 1997, for reasons set out in Memoranda of the same dates, the Court granted Strickler an evidentiary hearing on Claim B alleging ineffective assistance of trial counsel, on Claim J alleging that the Commonwealth withheld exculpatory and impeachment material ("Brady" material) on a chief prosecution witness, Ann Stoltzfus, and on Claim U alleging that the cumulative effect of constitutional errors at trial violated Strickler's right to a fair trial.

STANDARD

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir. 1991). The moving party has the initial burden of establishing the absence of a genuine issue of fact.[1] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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[1] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross Communications v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Where no genuine issue of material fact exists, the Fourth Circuit has imposed an obligation on the trial judge "to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255; *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1004 (4th Cir. 1987).

Once the movant has met this burden, and a properly supported motion is before the Court, the non-moving party must set forth specific facts showing that there is a genuine issue for trial in order to defeat the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Allstate*, 934 F.2d at 58. Summary judgment is proper if, based on the evidence, "a reasonable jury could [not] return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248; *Allstate*, 934 F.2d at 58.

ANALYSIS

Pursuant to a subpoena obtained by Petitioner to develop his federal habeas case, Strickler obtained copies of Detective Claytor's notes and interview reports as well as copies of materials sent to the Detective by Anne Stoltzfus. Early in the investigation, Claytor conducted several interviews with Stoltzfus. Claytor took notes of those interviews, prepared formal reports of the interviews, and received letters and notes from Stoltzfus. *See* Claytor's Response (4/22/97), Attachment 1 to Motion

for Summary Judgment. These materials are referred to herein as "the Stoltzfus materials."[2] Stoltzfus subsequently testified at Strickler's June 1990 trial that she had witnessed the abduction of the victim, Whitlock, from a Harrisonburg shopping mall. According to the prosecutor, Stoltzfus was the only eyewitness to the alleged abduction.

Exculpatory and Impeachment Material in the Stoltzfus Materials

The notes, letters, and interviews of Stoltzfus contradicted or impeached her trial testimony in many crucial respects. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman that she said she saw in the car at the time of the alleged abduction, and Stoltzfus provided no description of the woman's clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this fact is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [the victim's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as appearing to be "a rich college kid," "singing" and

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[2] The documents at issue ("the Stoltzfus materials") are attached as Exhibits 1-8 to the affidavits of William Bobbitt and Humes Franklin filed with Petitioner's Summary Judgment Motion.

"happy." Transcript of June 18 – 21, 1990 Trial ("Tr.") 483. Stoltzfus described the clothing Whitlock was wearing. These inconsistencies were extremely material for cross-examination.

When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could *not* positively identify Strickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 501. Stoltzfus was also unable to make a positive identification of Henderson (said to have been with Strickler at the time of the alleged abduction) from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews appear to have been contradictory to this testimony.

In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of

the physical features and clothing of the white woman allegedly accompanying them. Ex. 7.

Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me job [sic] my memory.

Not only does this letter provide impeachment material, it provides a basis for which Stoltzfus's testimony might have been excluded altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., that she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information, at a minimum, would likely have been extremely valuable in attacking her credibility with the jury, if counsel were not successful in actually barring her testimony altogether.

Claytor's handwritten notes of January 19, 1990 contain no mention of Stoltzfus's described encounter with Strickler and Henderson in a music store in the mall. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white woman

inside the mall. The woman, according to the report, bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her alleged encounter in a music store with Strickler and Henderson. Stoltzfus subsequently gave this testimony at trial. In the January 22 letter, Stoltzfus stated she was uncertain that the man she saw in the mall was even the same man that she later testified she saw approach Whitlock's car. ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> *I have a very vague memory that I'm not sure of.* It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? *Were those 2 memories the same person?*

(emphasis added). The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm *thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases.* Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(emphasis added). Once again Stoltzfus appeared to have admitted that she had not remembered being in the mall that night. Her "memory" appears to be based on what her daughter had told her.

A letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> *Thank you for your patience with my sometimes muddled memories.* I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm not sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, *I never would have made any of the associations that you helped me make.*

(emphasis added). Stoltzfus' memory of the events to which she testified appears to be muddled at best. Strickler likely could have utilized that in an effort to convince the jury that Stoltzfus' story was concocted with the assistance of the police, after viewing the evidence and photographs, after hearing discussions of the crime on campus, and perhaps influenced by the pervasive news coverage of Whitlock's murder. As the Supreme Court has noted, the evolution of a witness' description over a period of time can be fatal to its reliability. *See Kyles v. Whitley,* 514 U.S. 419, 444 (1995).

A plethora of additional impeachment material is contained in the Stoltzfus materials which is not set forth

here. The Court has discussed herein several of the documents that appear to be genuinely in dispute (Exhibits 2, 7, and 8) because it is necessary to refer to them to point out contradictions with Stoltzfus' other statements in the documents about which there is no genuine material dispute (Exhibits 1 and 3-6). However, even if the three documents that are in dispute were provided to Strickler's trial counsel, the other five documents that are not in dispute in the Court's view are sufficient to constitute a *Brady* violation and support the instant motion for summary judgment. The five documents containing the Stoltzfus' letters and notes to Det. Claytor provided potentially devastating impeachment material, casting doubt on her testimony.

Materiality of the Stoltzfus Materials

Respondent argues unsuccessfully that the suppressed documents were not "material" under *Brady* and therefore, the prosecutor had no obligation to disclose them to defense counsel. The Commonwealth's Attorney's argument on summation at Strickler's trial refutes this. The prosecutor argued that Stoltzfus' testimony established both the abduction predicate and the armed robbery predicate for the capital murder count:

> First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus [sic] says that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then drove off with Ms. Whitlock. She was

> brought here to Augusta County where she was detailed, where she was taken by abduction. Absolutely no issue about that.

Tr. at 794.

* * *

> And we are lucky enough to have an eyewitness who saw what happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stoltzfus was there, she saw what happened.

Tr. at 799. The Commonwealth's Attorney then repeated Stoltzfus' testimony in detail. (Tr. 799-801). He argued to the jury based on Stoltzfus' testimony that Strickler had a knife and that he held it against Whitlock as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him al [sic] the time. He had a knife later on with him in the car. *That was pressed right up against Leanne.* . . . Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

Tr. 800-01 (emphasis added).

Stoltzfus described Strickler alone as committing violent acts against Whitlock – he forced his way into her car

and struck her repeatedly. In this way, the Commonwealth's Attorney used Stoltzfus to prove that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. No other witness placed Strickler in the vicinity of Whitlock, her car, or the parking lot during the time period in which Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case, no other witness came forward to report the very public events that Stoltzfus claims to have witnessed. Stoltzfus was the critical witness on the abduction count.

Likewise, no other witness saw Strickler with a knife or any other weapon when at the mall. Stoltzfus herself never testified that Strickler had a knife when he was in the mall or allegedly in the car with Whitlock. That inference was provided by the prosecutor based on Stoltzfus' claim that Whitlock looked down while Strickler sat beside her in the car. Again, Stoltzfus was the critical witness for the armed robbery predicate based on what she "observed" in the parking lot. Thus, as the Commonwealth's Attorney recognized, Stoltzfus's testimony played a central role in Strickler's conviction and portrayed Strickler, rather than Henderson, as the leader and instigator in the violent abduction and robbery. Without Stoltzfus' testimony, which appears likely to be less certain than she portrayed, the jury may well have been reduced to speculation concerning these events and concerning the role played by Strickler. The jury could have found Henderson as the leader and instigator instead of Strickler.

Respondent relies on evidence that Strickler had Whitlock's car and possessions sometime after Stoltzfus

"witnessed" the alleged abduction and armed robbery to establish that the suppressed *Brady* materials could not undermine confidence in the outcome of the trial. This argument ignores substantial evidence that could have led a jury to believe that Henderson, rather than Strickler, was the ring-leader in Whitlock's abduction, robbery, and death. Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans.[3] Thus, Stoltzfus' testimony was not irrelevant to Strickler's conviction as Respondent maintains.

Without Stoltzfus' testimony, the jury could have concluded that Henderson was responsible for the abduction, robbery, and murder, and that Strickler was an accessory after the fact or a principal in the second degree but not a principal in the first degree to capital murder. The court had charged the jury on the offense of first degree murder. Conviction of a lesser offense was a reasonable probability if defense counsel had been given the Stoltzfus materials. Given that Stoltzfus initially did not even remember being at the mall on the night Whitlock was abducted, was later unsure whether the man she saw

[3] At Henderson's trial, the Commonwealth called this friend as its own witness to establish Henderson's guilt.

in the mall was the same one who approached Whitlock's car, and the large amount of impeachment material contained in the Stoltzfus materials, Strickler has satisfied the materiality requirement under *Brady* and *Kyles*. The undisclosed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). As *Kyles* emphasized, materiality does not require proof that the defendant would be acquitted or that the evidence was insufficient absent the *Brady* violation. A reasonable probability of conviction on lesser count satisfies the *Brady* standard.

Respondent's Duty to Disclose the Stoltzfus Materials

Exculpatory and impeachment material that is in the possession and control of the state must be disclosed to the defendant prior to trial. *See generally, Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). Respondent fails to offer a single piece of evidence to rebut Strickler's contention that his trial counsel was never provided with Exhibits 1, 3, 4, 5, and 6. Instead, Respondent argues that under *Brady*, the Commonwealth is required to disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. *See Barnes v. Thompson*, 58 F.3d 971, 975-77 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 4351 (1995). Respondent claims that there is no *Brady* violation if the information lies in a source where a reasonable defendant would have looked, *Barnes*, 58 F.3d at 975, and argues that the extent of Strickler's investigation at trial is an unresolved factual

issue. Respondent further states that the Stoltzfus materials were available to Strickler because he had notice shortly before the June 1990 trial that Stoltzfus would be a witness.

The Court disagrees. Even though the identity of the witness was known to the defendant before trial, the Stoltzfus materials were not available to the defense because they were not in a *public file* until subpoenaed during federal habeas proceedings. *See Kyles v. Whitley,* 514 U.S. 419 (1995) (holding that prosecutor violated *Brady* and noting that investigatory interviews are not available to defendant, even when names of witnesses and their testimony are known to defense); *United States v. Kelly,* 35 F.3d 929 (4th Cir. 1994) (reversing conviction and ordering new trial where impeachment material was not in public file and rejecting argument that evidence was available to defense with reasonable diligence).

Respondent's Failure To Disclose the Stoltzfus Materials

Augusta Commonwealth's Attorney Ervin prosecuted Strickler. Ervin had an open file policy such that Strickler's trial counsel, William E. Bobbitt, Jr., had full access to the prosecution's files. Both Bobbitt and co-defendant Henderson's defense counsel, Humes Franklin, have submitted affidavits stating that none of the Stoltzfus materials were in the prosecutor's open files which both defense attorneys reviewed in preparing their respective cases, and that they were not aware of the existence of these materials until 1997. *See* Bobbitt Affidavit (8/19/97), Attachment 2 to Petitioner's Motion For

Summary Judgment; Franklin Affidavit (9/5/97), Attachment 3 to Petitioner's Reply To The Warden's Response In Opposition To Strickler's Motion For Summary Judgment.

Of the eight Exhibits that comprise the Stoltzfus materials, Commonwealth Attorney Ervin only recalls reviewing Exhibits 2, 7, and 8 before Strickler's trial. He states that those three documents were in his open prosecution file and thus were accessible to defense counsel. However, Ervin does not remember reviewing Exhibits 1 or 3-6 prior to or during Strickler's trial. *See* Ervin Affidavit, Attachment 6 to Petitioner's Supplemental Memorandum In Further Support Of His Motion For Summary Judgment. Detective Claytor states via affidavit that he recalls distributing his typed report, Exhibit 2, to the Rockingham prosecutor but does not recall distributing any of the other materials prior to or during Strickler's trial. He only recalls producing those documents in response to the subpoena requested by Strickler's current federal habeas counsel. It appears that Strickler's trial counsel, his co-defendant Henderson's trial counsel, and the prosecutor all saw Exhibits 1 and 3-6 for the first time when Det. Claytor produced them from his private files to comply with the federal subpoena.

Respondent produced no evidence that Strickler was provided with Exhibits 1 or 3-6 of the Stoltzfus materials until four working days before the scheduled evidentiary hearing and several weeks after briefing on the cross-motions for summary judgment had been completed, at which time Respondent submitted a one paragraph affidavit by Bobbitt's co-counsel, Thomas E. Roberts, and a newspaper article. Roberts states by affidavit that he

cannot recall seeing any of the Stoltzfus materials, but remembers the information contained in them. He further states that he remembers "discussing with Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time." Roberts Affidavit.

The Court is somewhat skeptical about the accuracy of Roberts affidavit statements. The prosecutor, lead defense counsel for Strickler, and lead defense counsel for co-defendant Henderson all stated by affidavit that they did not see Exhibits 1 or 3-6 of the Stoltzfus materials before or during their respective trials. Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Despite the Court's skepticism regarding the accuracy of Roberts' affidavit statements, the Court nonetheless accepts Roberts' recollections as accurate and true for the purposes of summary judgment. Even accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary provided by Strickler and cited herein. The only specific details Mr. Roberts recalls

as impeaching Stoltzfus' testimony is that her story evolved over time and that she had not come forward immediately. Those details are but a portion of the contradictions and discrepancies found within the Stoltzfus materials which have been recounted only in part herein.

The Respondent also submitted a newspaper article from the "Roanoke Times & World-News" dated Sunday, June 17, 1990, the day before Strickler's trial began, and contends that this article contains all of the facts that Strickler claims were wrongfully withheld from him in violation of *Brady*. The Court disagrees with Respondent. This article does include some information that was also included in the Stoltzfus materials. For example, the article states that the individual interviewed, who appears to be Stoltzfus, at some point looked at pictures of Whitlock with John Dean, Whitlock's boyfriend, although it is not clear from the article whether this occurred before or after Stoltzfus identified Strickler. The article has a few details that might have been helpful to Strickler if he did not already know them. Besides these few details, however, the article contains virtually none of the information contained in the Stoltzfus materials and certainly did not relieve the Commonwealth from the burden of providing the Stoltzfus materials to Strickler. Respondent has not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation. A newspaper article which may not have been seen by defense counsel simply does not equate to a prosecutor's obligation under the law.

Thus, the evidence produced by Respondent, viewed in the light most favorable to Respondent, is insufficient

to create a genuine factual dispute as to whether the Commonwealth ever provided Exhibits 1, 3, 4, 5, or 6 – the majority of the Stoltzfus materials – to Strickler. The uncontradicted fact is that it had not. The Commonwealth had an affirmative duty to disclose those materials to Strickler's trial counsel because they contain exculpatory and impeachment material and are also "material" under *Brady* and its progeny.

CONCLUSION

Based on the materials disclosed pursuant to Court ordered discovery, the facts demonstrate that Exhibits 1 and 3-6 contained *Brady* material that was in the possession of the Harrisonburg police department, that the *Brady* material was not contained in the Augusta Commonwealth's Attorney's files, that Strickler's trial counsel reviewed the prosecutor's files pursuant to the "open file" policy, and that the relevant materials were not contained in the file. The pretrial motions and the trial transcript demonstrate the Commonwealth's Attorney's knowledge that several separate police departments and jurisdictions had been involved in the investigation of Strickler's case. The Commonwealth's Attorney called several of these officers as witnesses. He was clearly on notice that the files of these other agencies might contain material required to be disclosed to the defense attorney. Whether from good faith or bad, the effect is that these undisclosed materials were suppressed by the prosecution and never disclosed to Strickler's trial attorney. For the foregoing reasons, the Court will DENY Respondent's

motion, GRANT Petitioner's Motion for Summary Judgment on Claims J and U, thereby vacating Petitioner's conviction. An appropriate Order will enter.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

OCT 15 1997
DATE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TOMMY DAVID STRICKLER,

Petitioner-Appellee,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellant.

No. 97-29

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellee.

No. 97-30

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-95-924-3)

Argued: March 6, 1998

Decided: June 17, 1998

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by unpublished per curiam opinion. Judge Luttig wrote a separate statement.

COUNSEL

ARGUED: Pamela Anne Rumpz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Barbara Lynn Hartung, Richmond, Virginia, for Appellee. **ON BRIEF:** Richard Cullen, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Mark E. Olive, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The petitioner, Tommy David Strickler, applied for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia following his conviction and death sentence for capital murder in the Circuit Court of Augusta County, Virginia. *See* 28 U.S.C. § 2254.[1]

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[1] Because Strickler's petition for writ of habeas corpus was filed prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, the Chapter 153 amendments of the AEDPA do not apply in this case. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997) (holding that the Chapter 153 amendments, amendments applying to all federal habeas petitions, do not apply to federal habeas petitions pending on the date of the AEDPA's enactment). As to the Chapter 154 amendments, amendments applying to capital petitioners, we need not decide

The district court granted the writ, reasoning that Strickler's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecutor failed to disclose certain evidence at trial. The Commonwealth of Virginia (the Commonwealth), acting through one of its wardens, appeals this ruling. In his cross-appeal, Strickler appeals the district court's dismissal of his claim that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally deficient. Although the district court correctly dismissed Strickler's proportionality review claim, the district court erred when it granted Strickler relief under *Brady*. Accordingly, we affirm in part, vacate in part, and remand with instructions to dismiss the petition.

I

In 1990, Strickler was convicted of, *inter alia*, the capital murder of Leanne Whitlock. As recounted by the Virginia Supreme Court on direct appeal, the facts surrounding Whitlock's murder are:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the Mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne

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whether these amendments apply in this case because Strickler's claims are either procedurally defaulted or meritless under the more lenient pre-existing standards. Indeed, we are confident the AEDPA is of no help to Strickler.

dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury that Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote

down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[2] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three

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[2] Leanne was black.

drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt.

Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car near Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in

a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs.

Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground.

Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin, and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots.

Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's,

were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human blood stains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human blood stains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

Strickler v. Commonwealth, 404 S.E.2d 227, 230-32 (Va. 1991).

On February 27, 1990, Strickler was charged with grand larceny, robbery, and abduction in Rockingham County.[3] That same day, Strickler was indicted by an Augusta County grand jury for the robbery and abduction of Whitlock.[4] On April 23, 1990, Strickler was indicted by an Augusta County grand jury for the capital murder of Whitlock. Following a jury trial in Augusta County Circuit Court, Strickler was convicted of all three charges. The jury fixed Strickler's punishment at life imprisonment for the robbery and abduction convictions. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder conviction. Based upon findings of Strickler's future dangerousness and the vileness of the crime, the jury fixed Strickler's sentence at death. The trial court sentenced Strickler in accordance with the jury's verdicts.

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[3] Whitlock was abducted in Rockingham County, but murdered in Augusta County.

[4] As a result of the charges brought in Augusta County, the Rockingham charges were *nolle prosequi*.

Strickler appealed his convictions and sentences to the Virginia Supreme Court, and that court affirmed. *See Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991). On November 4, 1991, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Virginia*, 502 U.S. 944 (1991).

Strickler then sought state collateral relief in the Circuit Court for Augusta County. In September 1993, the circuit court dismissed Strickler's state habeas petition. The Virginia Supreme Court granted a limited appeal to address whether: (1) the state habeas court erred in refusing to vacate Strickler's capital murder conviction because of an erroneous capital murder jury instruction; and (2) his trial counsels' failure to object to the capital murder jury instruction rendered his trial counsels' performance constitutionally ineffective. The Virginia Supreme Court found the former claim procedurally defaulted under state law. *See Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995). As to the latter claim, the court found that Strickler was not prejudiced by the erroneous capital murder instruction and, therefore, failed to meet his burden of showing that, but for trial counsels' error, the result of the proceeding would have been different. *See id.* at 652-53. On October 2, 1995, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Angelone*, 516 U.S. 850 (1995).

On March 5, 1996, Strickler filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. On May 20, 1996, Strickler filed an amended petition. On January 16, 1997, the district court dismissed, among other claims, Strickler's

claim concerning the Virginia Supreme Court's proportionality review of his death sentence.

Following discovery, Strickler moved for summary judgment on his *Brady* claim. In response, the Commonwealth filed a cross motion for summary judgment. On October 15, 1997, the district court granted Strickler's motion for summary judgment and denied the Commonwealth's cross-motion for summary judgment. The district court held that Strickler's constitutional rights were violated by the prosecutor's failure to disclose certain evidence at trial. The Commonwealth moved for a stay of the district court's judgment pending appeal, which the district court granted. Both Strickler and the Commonwealth noted timely appeals.

II

In the district court, Strickler contended that statements and letters written by Anne Stolzfus, a Commonwealth witness, as well as police reports contained in the Harrisonburg Police Department files,[5] contained exculpatory evidence which was required to be disclosed under *Brady*. The parties refer to this evidence as "the Stolzfus materials," and these materials appear as Exhibits one through eight to an affidavit submitted in the district court by William Bobbitt, Jr., one of Strickler's trial counsel. The district court concluded that Strickler's rights were violated under *Brady* and issued the writ on that basis.

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[5] Harrisonburg is located in Rockingham County.

For two reasons, the Commonwealth contends the district court erred in issuing the writ. First, the Commonwealth contends that the *Brady* claim is procedurally defaulted and that Strickler has not established cause and prejudice to excuse the procedural default. Second, the Commonwealth contends that Strickler's *Brady* claim fails on the merits.

Strickler's *Brady* claim was never presented to the Virginia state courts. Strickler's failure to raise the claim in state court brings into play the doctrines of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and

that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1. We may excuse a procedural default if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Id.* at 750.[6]

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Thus, resolution of the question of whether Strickler's *Brady* claim is procedurally defaulted turns on whether the factual basis of

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[6] Before this court, Strickler has not attempted to establish that our refusal to address his *Brady* claim would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Strickler's *Brady* claim was available to him at the time he filed his state habeas petition.

We begin our discussion with a summary of the facts surrounding Strickler's *Brady* claim. Prior to trial, Detective Dan Claytor of the Harrisonburg Police Department interviewed Stolzfus on approximately five occasions. Detective Claytor took notes during, and typed reports of, his interviews with Stolzfus and received letters and "summaries" from Stolzfus. These documents, referred to by the parties as the "Stolzfus materials," were kept in Harrisonburg Police Department files.

On the day before trial, an article appeared in the Roanoke Times containing an interview with an unidentified prosecution witness, obviously Stolzfus. In the interview, Stolzfus summarized the circumstances surrounding Whitlock's abduction. This summary tracked her eventual trial testimony and also revealed a fact not contained in her trial testimony: that she had contacted Whitlock's boyfriend and viewed photographs of Whitlock.

At trial, Stolzfus testified that she was interviewed by Detective Claytor on several occasions and described Whitlock's abduction to a reporter from the Roanoke Times approximately one week prior to the trial. Stolzfus also testified that she had identified Strickler in a photo line-up.

As to the circumstances surrounding Whitlock's abduction, Stolzfus testified that on January 5, 1990, she went to the Valley Mall in Harrisonburg with her daughter. Around 6:00 p.m., they entered the Music Land store where she saw two men and a blond woman. One of the

men was "revved up" and impatient. She described the physical features of the three and their clothing. After Stolzfus left the store, she again encountered the trio inside the Valley Mall and spoke briefly to the woman. Shortly thereafter, Stolzfus and her daughter got into their car and stopped in the Valley Mall parking lot when a car came by. The driver was a black woman. Stolzfus described her as a "rich college kid," "beautiful," "well dressed," "happy," "singing," and "bright eyed." Stolzfus testified she got a good look at her and identified the driver as Whitlock.

Whitlock pulled in front of Stolzfus and stopped for traffic. The "revved up" man from the music store, whom Stolzfus later identified as Strickler, came out of the Valley Mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. The second man and the blond woman, seen earlier in the Valley Mall, tried to enter the car also. Whitlock accelerated and "laid on the horn." Strickler hit Whitlock repeatedly on her shoulder and head. When the car stopped, Strickler opened the passenger door, and the other two got into the backseat. The second man, later identified as Henderson, handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time."

Stolzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from" Stolzfus. Stolzfus returned to her car, faced Whitlock, and then asked her three times "are you O.K." Each time Whitlock looked at Stolzfus and then down to her right. Whitlock mouthed a word that

Stolzfus did not understand. She then realized that Whitlock had said "help." Stolzfus pulled away and told her daughter to go inside the Valley Mall and get security. The daughter refused. Whitlock drove past Stolzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." Stolzfus told her daughter to write the license number down on an index card. Stolzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243."[7]

On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a *Brady* motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all *Brady* material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stolzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

On federal habeas, Strickler served interrogatories and subpoenaed documents from various police and prosecution files. Pursuant to a subpoena, Strickler

[7] For reasons not entirely clear from the record, Stolzfus did not report the incident to law enforcement. However, the record does reflect that Stolzfus was approached by Detective Claytor after she had told a fellow classmate at James Madison University about the January 5, 1990 incident and her classmate informed law enforcement.

obtained the Stolzfus materials from the Harrisonburg Police Department files. Pursuant to another subpoena, Strickler obtained all materials concerning Stolzfus in the current custody of the Augusta County Commonwealth's attorney's office. The prosecutor's file contained Exhibits two, seven, and eight, but did not contain Exhibits one and three through six.[8]

[8] There is a dispute between the parties concerning which exhibits were disclosed to Strickler prior to trial. In response to Strickler's interrogatories, Lee Ervin, the prosecutor in Strickler's case, stated that he reviewed only Exhibits two, seven, and eight and had never reviewed Exhibits one and three through six prior to Strickler's trial. Ervin also stated that Exhibits two, seven, and eight were in his prosecution file and were disclosed to defense counsel pursuant to the open file policy. Bobbitt stated in his affidavit that he had never seen any of the Stolzfus materials prior to, or during, Strickler's trial, notwithstanding the open file policy. Similarly, Humes J. Franklin, Jr., Henderson's trial counsel, stated in his affidavit that he had no recollection of seeing any of the Stolzfus materials in Ervin's files. However, Thomas Roberts, Strickler's other trial counsel, stated in his affidavit that, although he could not recall if he had seen the Stolzfus materials, he did recall the "information contained in them." Roberts also stated that he had discussed with Bobbitt the "possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time." According to Roberts, "[i]t seemed too good to be true." The district court never resolved this dispute because the district court concluded that even if Exhibits two, seven, and eight were disclosed to Strickler, his rights under *Brady* were violated. We need not decide this factual dispute because, as discussed *infra*, Strickler's *Brady* claim is procedurally defaulted; Strickler has not established cause and prejudice to excuse the default; and the claim is, in any event, without merit.

As noted above, the Stolzfus materials appear as Exhibits one through eight to an affidavit submitted in the district court by Bobbitt. Exhibit one is a one-page document containing Detective Claytor's hand-written notes of his initial January 19, 1990 interview with Stolzfus. The notes reveal that Stolzfus could not identify Whitlock; could identify the blond woman; and indicated that Henderson was tall, had black hair, and wore a cream colored jacket. Exhibit two is a six-page, typed report of Detective's Claytor's interviews with Stolzfus on January 19 and 22, 1990. The report contains a detailed summary of Stolzfus' account of Whitlock's abduction. However, Detective Claytor's report notes that Stolzfus was not sure if she could identify Strickler and Henderson, although Stolzfus indicated she might if she saw Strickler and Henderson in person. Exhibit two also notes that Stolzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. According to the report, the next day Stolzfus advised police that she now recalled the license number, NKA 243, and "had made up a code to help remember the license number after the incident, 'No Kids After 243.' "

Exhibit three entitled "Observations" was given to Detective Claytor by Stolzfus on January 19, 1990, at 1:00 p.m. In this exhibit, Stolzfus describes the abduction with a set of diagrams.

Exhibit four is a typed letter, dated January 22, 1990, to Detective Claytor signed by Stolzfus. In this letter, Stolzfus explains that although she did not initially remember being at the Valley Mall on the evening Whitlock was abducted, her memory was "jogged" when her daughter reminded her of a small purchase at a shop in

the Valley Mall. In this exhibit, Stolzfus also explains that she was uncertain about portions of the events she witnessed the evening of Whitlock's abduction:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person? . . .

Exhibit five is an undated, typed document entitled "Notes for Detective Claytor: My Impressions of the Car." In this exhibit, Stolzfus gives a description of the car driven by Whitlock, but does not mention the license plate or the license plate number.

Exhibit six is a hand-written note to Detective Claytor from Stolzfus dated January 25, 1990, 1:45 a.m. In this note, Stolzfus reports that she spent several hours with Whitlock's boyfriend viewing photographs and was certain Whitlock was the black girl she saw on January 5, 1990.

Exhibit seven is a typed two-page letter dated January 26, 1990, to Detective Claytor and signed by Stolzfus. This letter contains a description of Stolzfus' encounter with Strickler, Henderson, and the blond woman at the music store in the Valley Mall.

Exhibit eight is a three-page, typed document, undated and signed by Stolzfus. The document is entitled "Details of Encounter with Mountain Man, Shy Guy and Blond Girl." This exhibit contains a detailed description

of Stolzfus' encounter with Strickler, Henderson, and the blond woman in the Valley Mall and of Whitlock's abduction. The summary of Whitlock's abduction in this exhibit essentially mirrors her trial testimony and the facts set forth in the Roanoke Times article.[9]

We are of the opinion that the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition and, therefore, the *Brady* claim is procedurally defaulted under the authority of *Hoke* and Va. Code Ann. § 8.01-654(B)(2). Strickler, of course, knew that Stolzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line-up. In light of these facts, reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files concerning Stolzfus' statements to Detective Claytor. Upon such a simple request, it is likely the state court would have ordered the production of the files. In other words, in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files, *see* Va. S. Ct. Rule 4:1(b)(5) (extending discovery, with prior leave of court, to all matters that are relevant and not privileged). His failure to do so results in a procedural default of his *Brady* claim.

Having concluded that Strickler's *Brady* claim would be procedurally defaulted if he attempted to raise it in

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[9] The Roanoke Times article was produced by the Commonwealth as an exhibit in its cross-motion for summary judgment.

state court at this time, we can only address Strickler's *Brady* claim if he can demonstrate cause and actual prejudice. *See Coleman*, 501 U.S. at 750. Objective factors that constitute cause include " 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.' " *McClesky v. Zant*, 499 U.S. 467, 493-94 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988). Additionally, the novelty of a claim has been held to constitute cause. *See Reed v. Ross*, 468 U.S. 1, 12-16 (1984); *see also Dugger v. Adams*, 489 U.S. 401, 407 (1989) (stating that cause may be established upon demonstration that a constitutional claim is "so novel that its legal basis is not reasonably available to counsel"). Finally, a petitioner may establish cause by showing he received constitutionally ineffective assistance of counsel. *See Coleman*, 501 U.S. at 753; *Murray*, 477 U.S. at 488.[10]

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[10] Generally, "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489; *see also Pruett v. Thompson*, 996 F.2d 1560, 1570 (4th Cir. 1993). This is so because allowing a petitioner to raise a claim of ineffective assistance of counsel for the first time on federal habeas review in order to show cause for a procedural default would place the federal habeas court "in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available" in contravention of "[t]he principle of comity that underlies the exhaustion doctrine." *Murray*, 477 U.S. at 489. Strickler has satisfied this requirement by presenting an ineffective assistance of counsel claim based on trial counsels' failure to file a *Brady* motion to the state court on state habeas.

Strickler asserts that the factual basis for his *Brady* claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause for the procedural default. But, as noted above, Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the *Brady* claim. *See Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994) ("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.").

Strickler also argues that his trial counsel were constitutionally ineffective for failing to make a *Brady* motion at trial. If attorney error amounts to constitutionally ineffective assistance of counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Amendment dictates that the attorney's error must be imputed to the state. *See Coleman*, 501 U.S. at 754. Accordingly, Strickler may establish cause to excuse his procedural default by showing trial counsel error that satisfies the standard set forth in *Strickland*. *See id.* at 752. Under *Strickland*, a defendant is deprived of the assistance of counsel guaranteed by the Constitution when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

In this case, Strickler's trial counsels' action did not fall below an objective standard of reasonableness. In

light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion. *Cf. Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983) ("Counsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.").

Even if we were to agree with Strickler that cause exists to excuse his procedural default, Strickler cannot establish prejudice. To establish "actual prejudice," Strickler "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir.), *cert. denied*, 118 S. Ct. 595 (1997).

Under *Brady* and its progeny, the prosecution's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir.) (quoting *Brady*, 373 U.S. at 87), *cert. denied*, 118 S. Ct. 738 (1998); *accord Kyles v. Whitley*, 514 U.S. 419, 431 (1995). However, evidence is material "only where there exists a 'reasonable probability' that had the evidence been disclosed the result of the trial would have been different." *Ellis*, 121 F.3d at 914 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995)). A "reasonable probability" of a different result is shown when the government's failure to disclose evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

In our view, the Stolzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock. In fact, counsel for Strickler argued to the jury during the guilt phase that they should convict Strickler of first degree murder rather than capital murder because Henderson, rather than Strickler, actually killed Whitlock. Thus, Stolzfus' testimony was not critical to the Commonwealth's case, especially in view of the overwhelming evidence in the record, independent of Stolzfus' testimony, demonstrating that Strickler abducted and robbed Whitlock. During the sentencing phase, Stolzfus' testimony was of no import. For the future dangerousness aggravating circumstance, the parties focused their arguments on Strickler's prior criminal record, which included approximately eleven prior convictions. As to the vileness predicate, although the prosecutor did state the uncontested fact that Whitlock was abducted, the focal point of his argument was on the use of the sixty-nine pound boulder to crush and fracture Whitlock's skull. In short, the failure to disclose any or all of the Stolzfus materials does not undermine our "confidence in the outcome of the trial." *Id.*

In summary, Strickler's *Brady* claim is procedurally defaulted and he has failed to establish cause and prejudice to excuse the default. Accordingly, the district court erred when it granted the writ on Strickler's *Brady* claim.[11]

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[11] Even if we could get beyond the threshold question of procedural default, for the same reasons why Strickler cannot demonstrate prejudice to excuse the procedural default of his *Brady* claim, Strickler's *Brady* claim fails on the merits.

III

In his cross-appeal, Strickler contends that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally inadequate. In response, the Commonwealth contends that this claim is procedurally defaulted and that Strickler has not established cause to excuse the procedural default. Alternatively, the Commonwealth argues that the claim is without merit.

Strickler presented this claim for the first time in his state habeas petition and it was found to be procedurally defaulted under the authority of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). In *Slayton*, the Virginia Supreme Court held that claims that could have been raised at trial or on direct appeal but were not cannot be considered on collateral review. *Id.* at 682. The district court held that Strickler's proportionality review claim was procedurally defaulted under *Slayton* and that Strickler failed to establish cause and actual prejudice to excuse the default.

Absent cause and actual prejudice or a miscarriage of justice,[12] a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489 U.S. 255, 262

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[12] Because Strickler has not attempted to establish that our refusal to address his procedurally defaulted proportionality review claim would result in a miscarriage of justice, we do not address the miscarriage of justice exception.

(1989). Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Under federal habeas law, we are not at liberty to question a state court's application of a state procedural rule because a state court's finding of procedural default is not reviewable if the finding is based upon an adequate and independent state ground. *See Harris*, 489 U.S. at 262; *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). Because *Slayton* is an independent and adequate state ground, we can consider only whether cause and prejudice exists to excuse the procedural default, not whether the state court correctly applied its own law. *See Harris*, 489 U.S. at 262.

Strickler contends that he has established cause because he was unable to raise his proportionality review claim until after the Virginia Supreme Court conducted such a review and subsequently affirmed his sentence on direct review. We disagree.

As noted earlier, objective factors that constitute cause include " 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.' " *McClesky*, 499 U.S. at 493-94 (quoting *Murray*, 477 U.S. at 488). Findings of the state court supporting its decision to apply the state procedural default rule are entitled to a presumption of correctness in determining whether cause exists to excuse a procedural default. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Stockton*, 41 F.3d at 924.

An issue before the Virginia Supreme Court on direct appeal was whether Strickler's death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See* Va. Code Ann. § 17-110.1(C)(2). Obviously, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, a facial challenge to all proportionality review in the Commonwealth of Virginia on direct appeal, prior to the Virginia Supreme Court's proportionality review. Furthermore, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, an as-applied challenge to the proportionality review that he received on direct appeal in a rehearing petition to the Virginia Supreme Court. In fact, Strickler filed a petition for rehearing, but did not challenge the Virginia Supreme Court's proportionality review of his death sentence. Accordingly, Strickler has not met his burden of " 'showing that the factual or legal basis for [the proportionality review] claim was not reasonably available to counsel,' " *McClesky*, 499 U.S. at 494 (quoting *Murray*, 477 U.S. at 488), and, therefore, has failed to establish cause to excuse the procedural default.[13]

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[13] Even if we were able to get past the threshold question of procedural default, Strickler would not be entitled to relief. First, it is well-settled that no proportionality review is constitutionally mandated. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). As we stated in *Petersen v. Murray*, 904 F.2d 882 (4th Cir. 1990), "this court may not issue a writ of habeas corpus on the ground that the [Virginia] Supreme Court has made an error of state law." *Id.* at 887 (citation and internal quotes omitted). *See*

IV

For the reasons stated herein, the judgment of the district court is affirmed in part, vacated in part, and remanded with instructions to dismiss the petition.

AFFIRMED IN PART, VACATED IN PART AND REMANDED WITH INSTRUCTIONS

LUTTIG, Circuit Judge:

Appellee/cross-appellant Tommy Strickler has filed a motion that I be disqualified from participation in the decision of this case pursuant to 28 U.S.C. § 455. (On different grounds, counsel for Strickler earlier sought, and was denied, recusal of the state habeas judge.). As grounds for disqualification, Strickler's counsel, Barbara L. Hartung and Mark E. Olive, cite the "unavoidable parallels" between the murder of my dad and the murder of Leanne Whitlock for which Strickler stands convicted. The Commonwealth opposes the motion for the reasons stated in its response.

The circumstances surrounding my dad's murder are so different from those surrounding the murder of Leanne Whitlock that, in my judgment, no one, except those who believe I should not sit in any murder case

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also Buchanan v. Angelone, 103 F.3d 344, 351 (4th Cir. 1996) (stating that claim that proportionality review was inadequate cannot form the basis of federal habeas corpus relief), *aff'd*, 118 S. Ct. 757 (1998). Second, we have examined the proportionality review conducted by the Virginia Supreme Court, *see Strickler v. Commonwealth*, 404 S.E.2d at 237, and we cannot conclude that Strickler has been denied any federal constitutional right, if one were to exist, to adequate and meaningful proportionality review.

because my dad was the victim of a murder, could, on this ground, reasonably question my ability to sit impartially on the panel deciding this case. Moreover, the legal issues presented in this appeal have no counterpart whatever in any of the proceedings involving those who murdered my dad. Accordingly, the motion is denied.

My dad was murdered in the driveway of his home in Tyler, Texas, during a carjacking, at approximately 11:00 p.m. on April 19, 1994 – more than four years ago now. Upon exiting his vehicle in the garage, my dad was confronted by three armed, black youths, and shot twice in the head with a .45 caliber weapon. A single shot was fired at my mother, but she was not struck. The three perpetrators left my parents' home immediately. No personal items, other than the car, were stolen from my dad or my mother. Nothing was stolen from the interior compartments of my parents' car. At trial, it was shown that the three youths who murdered my dad had contemplated, and actually attempted, other carjackings in the immediately preceding days and that they had, on the night of the murder, followed my mother and dad to their home, having the purpose and intent of stealing my parents' vehicle. Although the three who murdered my dad were black, there was no testimony presented of either racial motivation or racial animus. Two of the three youths were convicted in federal court on carjacking charges and in state court on murder charges. The third was convicted of capital murder in state court.

There are few parallels between the circumstances of my dad's murder and the circumstances of Leanne Whitlock's murder, and those that do exist are the most general in nature – for example, that three perpetrators were

involved and that they stole a vehicle. Leanne Whitlock was a black female, and a sophomore at James Madison University when she was murdered. Whitlock was forcibly abducted from a shopping mall parking lot in the early evening hours by Strickler, a white adult male, and two white adult companions.

The three forced Whitlock to drive to a distant cornfield, where she was apparently raped, and then killed with a 69-pound boulder. *Id.* at 231. According to the Virginia Supreme Court, whose findings in this particular regard are not before us for review:

> Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking.

Id. The Virginia Supreme Court affirmed that Whitlock's "[d]eath was caused by four large, crushing, depressed skull fractures with lacerations to the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were embedded in the brain." *Id.* Whitlock's nude, frozen, buried body was subsequently found in the field by authorities. Again according to the Virginia Supreme Court, the shirt worn by Strickler the night of the murder "bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified." *Id.* at 231-32. Said the court:

> Prior to [Whitlock's] murder, the victim had been abducted by strangers, was terrified and called for help, was driven to a deserted field, was dragged, struggling, out of her car, was stripped naked, beaten, kicked, and sexually assaulted.

Id. at 237.

After the murder, Strickler and his codefendant discussed, in the presence of a third person, a fight they had had with a "nigger," *id.* at 231; Strickler said they had kicked the "nigger" in the back of the head, had used a "rock crusher," and that the "nigger" would give them no more trouble. *Id.* Strickler, his codefendant, and the third person then drove back to the town where the murder occurred "to purchase drugs." *Id.*

Strickler was indicted for robbery of not only Whitlock's vehicle, but also other of her personal property, including her wristwatch, earrings, and bank card. *Id.* at 230-31. Although Strickler was indicted and apparently convicted for robbery of Whitlock's vehicle, it is unclear whether Whitlock's vehicle was stolen principally for the value of the car itself or instead as a get-away vehicle; the suggestion is that the latter was the purpose. *See Strickler v. Commonwealth*, 404 S.E.2d 227, 230 (Va. 1991) ("Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounded on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window.").

Apart from the dissimilarity of the circumstances between my dad's murder and Whitlock's murder, to my

knowledge the issues presented by this appeal under *Brady v. Maryland*, 373 U.S. 83 (1963), bear no resemblance in any respect to any of the issues raised by any of those convicted of my dad's murder in any of their proceedings to date. Indeed, insofar as I am aware, there has never been raised an issue of changing eye-witness testimony or the improper withholding of exculpatory evidence in any of the appeals from the convictions for my dad's murder.

Against the backdrop of the factual and legal dissimilarities between my dad's murder and the appeals from the ensuing convictions on the one hand, and Leanne Whitlock's murder and the instant appeal on the other, the natural inference arises that the present disqualification motion has been filed not because my dad was the victim of a murder, but, rather, because I am the author of three, and I joined a fourth, of this Circuit's authorities which Strickler's counsel could have reasonably surmised might bear upon the disposition of the appeals *sub judice*. *See Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995) (Luttig, J.), *cert. denied*, 116 S. Ct. 4351 (1995); *Hoke v. Netherland*, 92 F.3d 1350 (4th Cir.) (Luttig, J.), *cert. denied*, 117 S. Ct. 630 (1996); *In re Netherland*, No. 97-8 (4th Cir. Apr. 10, 1997) (Luttig, J., single Circuit Judge) (staying district court's *ex parte* grant of pre-petition discovery to state prisoner); *In re Pruett*, 133 F.3d 275 (4th Cir. 1997) (Hall, J., joined by Luttig and Motz, JJ.).

Because of the time that has elapsed since my dad's murder; the dissimilarity of the circumstances surrounding my dad's and Leanne Whitlock's murders; and the lack of any overlap in the legal issues presented in the appeals of the two cases, I do not believe that it can

reasonably be maintained either that I cannot impartially sit in judgment of this appeal or that my impartiality can fairly be questioned. Nor, any more than recusal from discrimination cases should be required by judges who themselves, or whose families, have been subjected to invidious racial or sexual discrimination, do I believe that my recusal is required from this and all other murder cases for the reason alone that my dad was the victim of a murder.

The purpose of section 455 is not to require recusal from the courts of all who have experienced the fullness of life – good and bad; and certainly its purpose is not to enable forum shopping by parties to litigation. Rather, its purpose is only to ensure that the matters before the courts are decided by a judiciary that is impartial both in fact and in appearance. I do not believe that this indisputably important purpose is, in any way, compromised or disserved by my participation in this case. As I have earlier stated in open court, capital defendants are entitled to fair and impartial consideration of their claims by me when I am randomly selected to serve on the panel hearing their cases. Neither before nor after my dad's murder have they received less.

98-5864 STRICKLER, TOMMY D. V. GREENE, WARDEN

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following questions:

1. Whether the States violaded [sic] *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

2. If so, whether the State's nondisclosure of exculpatory evidence and the State's representation that its open file contained all *Brady* material establishes the requisite "cause" for failing to raise a *Brady* claim in state proceedings.

3. Whether petitioner was prejudiced by non-disclosure.
